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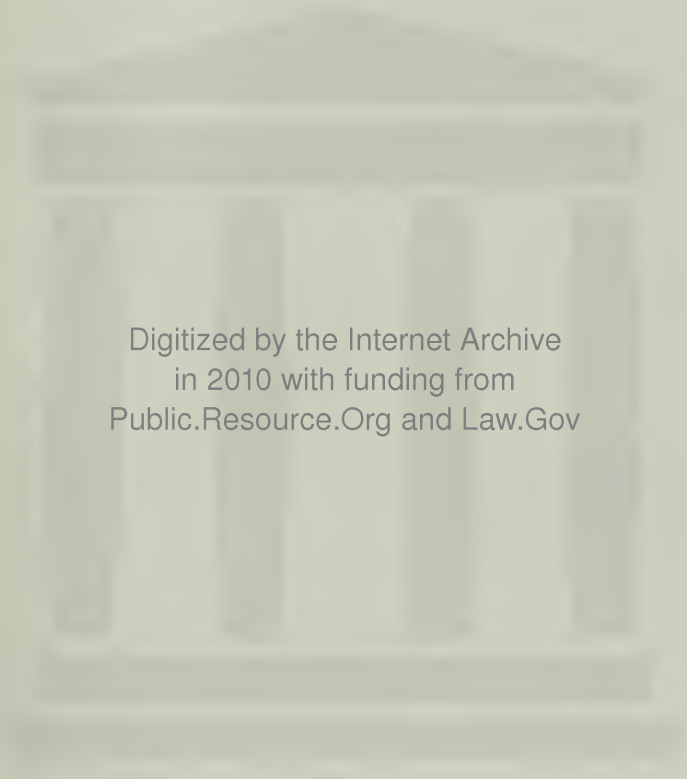

No. 13959

United States
Court of Appeals
for the Ninth Circuit.

VICTOR GOTHBERG, an individual doing business as GOTHBERG CONSTRUCTION COMPANY, Appellant and Appellee,

vs.

BURTON E. CARR, JANE DOE CARR, his wife, JACK AKERS and SHERMAN JOHNSTONE, Appellees and Appellants.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 376, inclusive)

Appeals from the District Court for the Territory of Alaska, Third Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California

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[Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

E. L. ARNELL,

218 Central Building,
Anchorage, Alaska,

Attorney for Plaintiff.

BELL & SANDERS,

P. O. Box 1599,
Anchorage, Alaska,

Attorneys for Defendants.

In the District Court for the Territory of Alaska,
Third Division

No. A 7644

VICTOR GOTHBERG, an individual doing business as GOTHBERG CONSTRUCTION COMPANY, Plaintiff,

vs.

BURTON E. CARR, JANE DOE CARR, his wife, JACK AKERS and SHERMAN JOHNSTONE, Defendants.

COMPLAINT

Comes now the plaintiff above named and for his first cause of action against the defendants complains and alleges as follows:

First Cause of Action

I.

That the plaintiff is an individual engaged in a general construction and contracting business doing business under the firm name and style of the Gothberg Construction Company.

II.

That at the special instance and request of the defendants the plaintiff constructed a foundation for the building now located upon Lot One, Block Twenty of the East Addition to the original townsite of Anchorage, Alaska; that pursuant to the provisions of the written contract entered into between the parties on or about the 1st day of Oc-

tober, 1950, the agreed value of the work performed by the plaintiff is in the sum of $4051.84.

Second Cause of Action

And for a second cause of action the above named plaintiff does complain and allege as follows:

I.

All of the allegations of Paragraph I of the First Cause of Action are hereby adopted and incorporated as if set out in full.

II.

That at the special instance and request of the defendants the plaintiff constructed a garage building which is now located upon Lot One, Block Twenty of the East Addition to the original townsite of Anchorage, Alaska; that pursuant to the provisions of the written contract entered into between the parties on or about the 1st day of October, 1950, the agreed value of the work performed by the plaintiff is in the sum of $38,450.00.

Third Cause of Action

And for a third cause of action the above named plaintiff does complain and allege as follows:

I.

All of the allegations of Paragraph I of the First Cause of Action are hereby adopted and incorporated as if set out in full.

II.

That at the special instance and request of the defendants the plaintiff performed interior finish work upon the building now located upon Lot One,

Block Twenty of the East Addition to the original townsite of Anchorage, Alaska; that pursuant to the provisions of an oral contract entered into between the parties for such work the agreed and reasonable value of the work performed by the plaintiff is in the sum of $5,351.74.

And for a fourth cause of action the above named plaintiff does complain and allege as follows:

Fourth Cause of Action

I.

All of the allegations of Paragraph I of the First Cause of Action are hereby adopted and incorporated as if set out in full.

II.

That at the special instance and request of the defendants the plaintiff performed additional work in accordance with a change order according to specification paragraph CC-15 of the written contract entered into between the parties on or about the 1st day of October, 1950, the agreed value of which is in the sum of $3,925.58.

That by reason of the above work performed the defendants were indebted to the plaintiff in the sum of $51,779.16.

That the defendants have made payment to the plaintiff upon said indebtedness the sum of $34,-605.00, leaving a balance due and owing in the amount of $17,174.16.

That the plaintiff has made demand upon the defendants for the payment of said sum; that the defendants have failed and refused to pay said

sum or any part thereof, and now the whole of said indebtedness is owing from the defendants to the plaintiff.

Wherefore, the plaintiff prays judgment against the plaintiffs and each of them as follows:

1. For the sum of $17,174.16, together with interest thereon at the rate of eight per cent per annum from the 1st day of March, 1951.

2. For the costs and disbursements of this action, including attorneys' fees, incurred by the plaintiff.

3. For such other and further relief as the Court may deem proper in the premises.

PLUMMER & ARNELL,
/s/ By RAYMOND E. PLUMMER,
Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed April 4, 1952.

[Title of District Court and Cause.]

HEARING ON MOTION TO GIVE MORE AND BETTER BOND

Now at this time hearing on motion to give more and better bond in Cause No. A-7644, entitled Victor Gothberg, dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, Defendants, came on regularly before the Court, Edward L. Arnell, appearing for and in behalf of the

plaintiffs, and Bailey E. Bell appearing for and in behalf of the defendant.

Argument to the Court was had by Bailey E. Bell, for and in behalf of the defendant.

At this time Court continued cause to 4:00 o'clock p.m. of Wednesday, April 30, 1952.

Entered April 28, 1952.

[Title of District Court and Cause.]

M.O. OF CONTINUANCE

Now at this time upon motion of Raymond E. Plummer, of counsel for plaintiffs, and with Bailey E. Bell, of counsel for defendants not objecting thereto,

It Is Ordered that Cause No. A-7644, entitled Victor Gothberg, dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, Defendants, heretofore set for 4:00 o'clock p.m. this date be and it is hereby, continued to 1:30 o'clock p.m. of Thursday, May 1, 1952.

Entered April 30, 1952.

[Title of District Court and Cause.]

HEARING ON MOTION TO REQUIRE MORE AND BETTER BOND CONTINUED

Now at this time came the respective counsel as heretofore and hearing on motion to require more and better bond in Cause No. A-7644, entitled Victor

Gothberg, dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, Defendants, was resumed.

Reporting Waived.

Argument to the Court was had by Edward L. Arnell, of counsel for plaintiff.

Argument to the Court was had by Bailey E. Bell, for and in behalf of the defendants.

Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises, announced it would reserve its decision in this cause.

Entered May 1, 1952.

[Title of District Court and Cause.]

M.O. RENDERING ORAL DECISION

Now at this time arguments having been had heretofore and on the 1st day of May, 1952, and decision reserved in Cause No. A-7644, entitled Victor Gothberg, dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, Defendants,

Whereupon the Court now rules that bondsmen will be required to appear in Court at 1:30 o'clock p.m. of Wednesday, May 28, 1952, to be examined in respect to their financial qualifications.

Entered May 23, 1952.

[Title of District Court and Cause.]

HEARING ON MOTION TO MAKE MORE DEFINITE AND CERTAIN, OR IN LIEU THEREOF, A DEMAND FOR BILL OF PARTICULARS

Now at this time hearing on motion to make more definite and certain, or in lieu thereof, a demand for bill of particulars in Cause No. A-7644, entitled Victor Gothberg, dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, Jack Akers and Sherman Johnstone, Defendants, came on regularly before the Court, Edward L. Arnell, appearing for and in behalf of the plaintiff, and Bailey E. Bell, appearing for and in behalf of the defendants.

Argument to the Court was had by Bailey E. Bell, for and in behalf of the defendants.

Argument to the Court was had by Edward L. Arnell, for and in behalf of the plaintiff.

Argument to the Court was had by Bailey E. Bell, for and in behalf of the defendants.

Whereupon the Court denied motion and defendants given 20 days within which to answer.

Entered May 23, 1952.

[Title of District Court and Cause.]

HEARING ON JUSTIFICATION OF BONDSMEN

Now at this time Hearing on Justification of Bondsmen in Cause No. A-7644, entitled Victor Gothberg, an individual d/b/a Gothberg Construction Company, Plaintiff versus Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, Defendants, came on regularly before the Court. Edward L. Arnell appearing for and in behalf of the Plaintiff and Bailey E. Bell appearing for and in behalf of the Defendants.

Keith Young, being first duly sworn, testifies for and in behalf of the defendants.

Leslie Larson, being first duly sworn, testifies for and in behalf of the defendants.

Whereupon the Court finds sureties qualified and motion for more and better bond denied.

Entered May 28, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now Marie Carr, and for answer to the plaintiff's Complaint filed herein, admits, denies and alleges as follows, to-wit:

I.

Answering defendant denies the allegations set forth in plaintiff's first cause of action, and the whole thereof.

II.

That she denies the allegations of plaintiff's second cause of action, and the whole thereof.

III.

That she denies the allegations of plaintiff's third cause of action, and the whole thereof.

IV.

She denies that she is indebted to the plaintiff in any sum whatsoever and asks that she be dismissed, and that she be allowed her costs herein, including a reasonable sum as attorney's fees for defending in this action.

Wherefore, defendant prays judgment of this Court as follows, to-wit:

1. That the plaintiff have and recover no judgment whatsoever against this defendant and that his complaint be fully and completely dismissed as against her.

2. That she recover her costs herein expended, including a reasonable sum as attorney's fees for defending this action, and for such other and further relief as the Court deems just and equitable in the premises.

BELL & SANDERS,
/s/ By BAILEY E. BELL,
Of Attorneys for Defendant
Marie Carr.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed June 7, 1952.

[Title of District Court and Cause.]

M. O. SETTING CAUSE FOR TRIAL

Now at this time upon motion of Edward L. Arnell, of counsel for the plaintiff,

It Is Ordered that Cause No. A-7644, entitled Victor Gothberg, an individual doing business as Gothberg Construction Company, plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, defendants, be, and it is hereby, set for trial to follow trial of Cause A-6581, entitled Alaskan Plumbing & Heating, Inc., versus James Aylen, versus Ron C. Malcolm, defendants, set for trial August 20, 1952.

Entered July 25, 1952.

[Title of District Court and Cause.]

M.O. DISMISSING CAUSE AS TO DEFENDANTS AKERS AND JOHNSTONE

Now at this time upon motion of Edward L. Arnell, of counsel for plaintiff,

It Is Ordered that cause be and it is hereby, dismissed as to the defendants Akers and Johnstone, in Cause No. A-7644, entitled Victor Gothberg, an individual dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife and Jack Akers and Sherman Johnstone, Defendants.

Entered September 22, 1952.

[Title of District Court and Cause.]

TRIAL BY JURY

Now on this 22nd day of September, 1952, came the plaintiff, Victor Gothberg and with Edward L. Arnell and William Plummer, of his counsel, came the defendant Burton Carr and with Bailey E. Bell, of his counsel, and both sides announcing themselves as ready for trial in Cause No. A-7644, entitled Victor Gothberg, an individual dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife, Defendants, the following proceedings were had, to-wit:

The Deputy Clerk, under the direction of the Court, proceeded to draw from the Trial Jury Box, one at a time, the names of the members of the regular panel of Petit Jurors and respective counsel examined and exercised their challenges against said Jurors so drawn.

At 11:00 o'clock a.m. Court duly admonished the Jurors in the Box and continued cause to 11:10 o'clock a.m.

Now came the Jurors in the Box, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, an individual dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife, Defendants, was resumed.

Whereupon, the Deputy Clerk, under the direc-

tion of the Court, continued to draw from the Trial Jury Box, one at a time, the names of the members of the regular panel of Petit Jurors and respective counsel examined and exercised their challenges against said Jurors so drawn, until both sides were satisfied and the Jury complete, consisting of the following named persons, to-wit: 1. Ellen Curtiss; 2. Lois Wise; 3. Nevin H. Boward; 4. R. E. Taylor; 5. Jerry Roys; 6. Roy H. Smith; 7. Muriel Lohnes; 8. Dorothy Jacobs; 9. Florence Hoffman; 10. Nettie A. White; 11. George Kurtz; 12. Irene Robinson.

Upon stipulation of respective counsel two alternate Jurors were drawn, to-wit: 1. Rachel Linder; 2. Leonard M. Johnson; which said Jury was duly sworn by the Deputy Clerk to well and truly try the matters at issue in the above-entitled cause and a true verdict render in accordance with the evidence and the instructions given by the Court.

At this time the Court excused the members of the regular panel of Petit Jurors, not engaged in the trial of this cause, to report at 10:00 o'clock a.m. of Thursday, September 25, 1952.

At 11:50 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, an individual dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr, Jane Doe Carr, his wife, Defendants, was resumed.

Opening statement to the Jury was had by Edward L. Arnell, for and in behalf of the plaintiff.

Opening statement to the Jury was had by Bailey E. Bell, for and in behalf of the defendants.

At this time Bailey E. Bell, for and in behalf of the defendant Marie Carr, moves Court cause be dismissed as to defendant Marie Carr; Edward L. Arnell, for and in behalf of the plaintiff, objecting thereto.

Motion denied.

Copy of a proposal for revising Nash Garage Foundation, 5/24/50, signed by Victor F. Gothberg, unsigned by Burton E. Carr, was duly offered, marked and admitted as Plaintiff's Exhibit 1.

A contract, 9/19/50, by and between Victor Gothberg and Burton E. Carr and signed by both parties was duly offered, marked and admitted as Plaintiff's Exhibit 2.

Victor F. Gothberg, being first duly sworn, testified for and in own behalf.

A foundation plan numbered BCG-1 was duly offered, marked and admitted as Plaintiff's Exhibit 3.

At 3:10 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 3:20 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, an individual dba Gothberg Construction Company, Plaintiff, versus Burton E.

Carr, Jane Doe Carr, his wife, Defendants, was resumed.

Victor Gothberg, heretofore sworn, resumed stand for further testimony for and in own behalf.

Nine sheets of plans for subject construction was duly offered, marked and admitted as Plaintiff's Exhibit 4-A through 4-I.

Copy of a statement sent to Mr. Burton E. Carr by Gothberg Construction Co., dated 2/23/51 was duly offered, marked and admitted as Plaintiff's Exhibit 5.

Plans and specifications for subject building was duly offered, marked and admitted as Plaintiff's Exhibit 6.

At 4:30 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 10:00 o'clock a.m. of Tuesday, September 23, 1952.

Now came the Trial Jury, who on being called each answered to his or her name, except for Juror R. E. Taylor who failed to report and he was excused from service on the Trial Jury and his place was taken by first Alternate, Leonard M. Johnson, came the respective parties, came also the respective counsel as heretofore, and the Trial of Cause No. A-7644 entitled Victor Gothberg, individual /d/b/a Gothberg Construction Company, plaintiff versus Burton E. Carr, and Jane Doe Carr, his wife, defendants, was resumed.

Victor F. Gothberg, heretofore sworn resumed stand for further testimony for and in his own behalf.

A letter dated, 12/28/50, to Victor F. Gothberg

signed by Lorn E. Anderson, was duly offered, marked and admitted as Plaintiff's Exhibit 7.

A statement to Mr. Burton E. Carr was duly offered, marked and admitted as Plaintiff's Exhibit 8.

A statement to Mr. Burton E. Carr was duly offered, marked and admitted as Plaintiff's Exhibit 9.

Five statements Re. Subject Construction, was duly offered, marked and admitted as Plaintiff's Exhibit 10.

A statement, dated 1/14/52, to Mr. Burton E. Carr was duly offered, marked and admitted as Plaintiff's Exhibit 11.

At 11:00 o'clock a.m. Court duly admonished the Trial Jury and continued Cause to 11:10 o'clock a.m.

At 11:00 o'clock a.m. Court declared recess to 11:10 o'clock a.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644 entitled Victor Gothberg, individual /d/b/a, Gothberg Construction Company, plaintiff, versus Burton E. Carr, and Jane Doe Carr, his wife, defendants, was resumed.

Victor F. Gothberg, heretofore sworn, resumed stand for cross examination for and in behalf of the defendants.

A plan, BCG-5, was duly offered, marked and admitted as Defendants' Exhibit "A."

A statement, dated 10/20/50, to Mr. Burton E.

Carr was duly offered, marked and admitted as Defendants' Exhibit "B."

At 12:00 o'clock Noon Court duly admonished the Trial Jury and continued Cause to 2:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644 entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff versus Burton E. Carr and Jane Doe Carr, his wife, defendants was resumed.

Victor F. Gothberg, heretofore sworn, resumed stand for further cross examination for and in behalf of the defendants.

A plan, BCG-8 was duly offered, marked and admitted as Defendants' Exhibit "C."

A notice of demand to meet the terms of contract, dated 5/6/52, signed by Burton E. and Marie Carr was duly offered, marked and admitted as Defendants' Exhibit "D."

At 3:00 o'cock p.m. Court duly admonished the Trial Jury and continued Cause to 3:10 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644 entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff versus Burton E. Carr and Jane Doe Carr, his wife, defendants, was resumed.

Victor F. Gothberg, heretofore sworn, resumed stand for further cross examination for and in behalf of the defendants.

Edward L. Arnell for and in behalf of the plaintiff moved the Court for leave to amend complaint to conform to the proof; Bailey E. Bell for and in behalf of the defendants objecting thereto; Motion granted.

Now at this time Bailey E. Bell for and in behalf of the defendants moved Court for dismissal of action as to the Defendant, Marie Carr; Edward L. Arnell for and in behalf of the plaintiff objected thereto; decision reserved.

Now at this time Bailey E. Bell, for in behalf of the defendants, moved the Court for dismissal of action as to defendant, Burton E. Carr; motion denied.

Burton E. Carr, first duly sworn, testified for and in behalf of the defendants.

At 4:00 o'clock p.m. Court duly admonished the Trial Jury and continued Cause to 4:10 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644 entitled Victor Gothberg, individual, /d/b/a Gotherg Construction Company, Plaintiff versus Burton E. Carr and Jane Doe Carr, his wife, defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further testimony for and in behalf of the defendants; a check, in the sum of $175.98, dated

3/16/51, payable to Anchorage Installation signed by Mrs. Burton E. Carr, was duly offered, marked and admitted as Defendants' Exhibit "E."

A check, dated..... in the sum of $11,535.00 payable to Victor Gothberg Construction Company signed by Mrs. Burton E. Carr with statement attached was duly offered, marked and admitted as Defendants' Exhibit "F."

A check dated 1/13/51, in the sum of $12,756.07 payable to Victor Gothberg Construction Company, signed by Burton E. Carr, with statement attached, was duly offered, marked and admitted as Defendants' Exhibit "G."

At 4:35 o'clock p.m. Court duly admonished the Trial Jury and continued the cause to 10:00 o'clock a.m. Wednesday, September 24, 1952.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further testimony for and in behalf of the defendants.

A check, dated 2/25/51, sum of $10,381.50, payable to Victor Gothberg Construction Co., signed by Burton E. Carr, with statement attached, was duly offered, marked and admitted as Defendants' Exhibit "H."

A check, dated 2/24/51, sum of $285.92, payable to Anchorage Installation signed by Mrs. Burton E. Carr was duly offered, marked and admitted as Defendants' Exhibit "I" for identification.

At 11:00 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 11:10 o'clock a.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further testimony for and in behalf of the defendants.

Defendants' Exhibit "I" for identification, with three statements to Commercial Automotive Company by Anchorage Installation Company attached were duly offered, marked and admitted as Defendants' Exhibit "I."

At 12 noon Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E.

Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Archie M. Cupples, being first duly sworn, testified for and in behalf of the defendants.

Kenneth W. Luse, being first duly sworn, testified for and in behalf of the plaintiff.

At 3:00 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 3:10 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further testimony for and in behalf of the defendants.

A picture of a Rotary Mechanic's lift was duly offered, marked and admitted as Defendants' Exhibit "J."

At 4:00 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 4:10 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further cross examination for and in behalf of the plaintiff.

A check, dated 11/8/50, sum of $2,725.71 payable to Alaska Engineering Supply signed by Mrs. Burton E. Carr was duly offered, marked and admitted as Defendants' Exhibit "K."

At 4:45 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 9:30 o'clock a.m. of Thursday, September 25, 1952.

Entered September 22-23-24, 1952.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now the plaintiff above named, pursuant to leave of Court heretofore granted upon motion duly made, and complains and alleges as follows:

First Cause of Action

I.

That the plaintiff is an individual engaged in a general construction and contracting business doing business under the firm name and style of the Gothberg Construction Company.

II.

That on or about the 25th day of May, 1950, the plaintiff and the defendant, Burton E. Carr, on behalf of the defendants, entered into a written contract whereby the plaintiff agreed to do and

perform certain construction work in the erection of a foundation upon Lot One (1), Block Twenty (20) of the East Addition to the original townsite of Anchorage, Alaska; that the agreed value of the work to be performed by the plaintiff was in the sum of $2542.00.

III.

That thereafter the plaintiff fully performed the obligations of his contract with the defendants and completed said foundation, according to the original plans and specifications; that by reason thereof the defendants are indebted to the plaintiff in the sum of $2542.00; that the whole of said sum is now due and owing, notwithstanding plaintiff's demands upon the defendants for payment thereof.

Second Cause of Action

And for a second cause of action the above named plaintiff does complain and allege as follows:

I.

All of the allegations of Paragraph I of the First Cause of Action are hereby adopted and incorporated as if set out in full.

II.

That the plaintiff, at the special instance and request of the defendants, rendered and performed certain services in addition to those required by the contract alleged in plaintiff's first cause of action; that the labor and materials so furnished constituted extras in addition to the sum specified in said contract; that the agreed and reasonable value

of such additional work performed by the plaintiff was in the sum of $1,459.84.

III.

That plaintiff has made demand upon the defendants for the payment of said sum but the whole thereof is now due and owing from the defendants to the plaintiff.

Third Cause of Action

And for a third cause of action the above named plaintiff does complain and allege as follows:

I.

All of the allegations of Paragraph I of the First Cause of Action are hereby adopted and incorporated as if set out in full.

II.

That on or about the 19th day of September, 1950, the plaintiff entered into a written contract with Burton E. Carr for the construction of a building, located upon Lot One (1), Block Twenty (20) of the East Addition, said lot then being owned by the defendants; that by the terms and provisions of said contract, and the plans and specifications, the agreed price to be paid by the defendants to the plaintiff was in the sum of $38,-450.00.

III.

That thereafter, under the terms and provisions of said contract, specifications and plans, and in compliance therewith, the plaintiff substantially performed said contract and is entitled to final payment thereon in the amount of $3845.00; that the

plaintiff has received partial payment upon said contract and there now remains due and owing to the plaintiff from the defendants the sum of $3845.00.

IV.

That plaintiff has made demand upon the defendants for the payment of said remaining balance but the whole thereof is now due and owing from the defendants to the plaintiff.

Fourth Cause of Action

And for a fourth cause of action the above named plaintiff does complain and allege as follows:

I.

All of the allegations of Paragraph I of the First Cause of Action are hereby adopted and incorporated as if set out in full.

II.

That at the special instance and request of the defendants the plaintiff performed interior finish work upon the building now located upon Lot One, Block Twenty of the East Addition to the original townsite of Anchorage, Alaska; that pursuant to the provisions of an oral contract entered into between the parties for such work the agreed and the reasonable value of the work performed by the plaintiff is in the sum of $5,351.74.

III.

That plaintiff has made demand upon the defendants for the payment of said sum but the whole thereof is now due and owing from the defendants to the plaintiff.

Fifth Cause of Action

And for a fifth cause of action the above named plaintiff does complain and allege as follows:

I.

All of the allegations of Paragraph I of the First Cause of Action are hereby adopted and incorporated as if set out in full.

II.

That at the special instance and request of the defendants, the plaintiff performed additional work in accordance with a change order according to specification paragraph CC-15 of the written contract, entered into between the parties, the agreed and reasonable value of which is in the sum of $3,925.00.

III.

That the plaintiff has made demand upon the defendants for the payment of said sum; that the defendants have failed and refused to pay said sum or any part thereof, and now the whole of said indebtedness is owing from the defendants to the plaintiff.

Wherefore, the plaintiff prays judgment against the plaintiffs and each of them as follows:

1. For the sum of $17,174.16, together with interest thereon at the date of six per cent (6%) per annum from the 1st day of March, 1951.

2. For the costs and disbursements of this action, including attorneys' fees, incurred by the plaintiff.

3. For such other and further relief as the Court may deem proper in the premises.

PLUMMER & ARNELL,
/s/ By E. L. ARNELL,
Attorneys for Plaintiff.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 25, 1952.

[Title of District Court and Cause.]

TRIAL BY JURY CONTINUED

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further cross examination for and in behalf of the Plaintiff.

An order for extra work, dated 2/20/51, to Anchorage Installation Company signed by B. E. Carr was duly offered, marked and admitted as Plaintiff's Exhibit 12.

An order for extra work, dated 1/2/51, to Anchorage Installation Company, signed by Burton E.

Carr was duly offered, marked and admitted as Plaintiff's Exhibit 13.

At 11:05 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 11:15 o'clock a.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further cross examination for and in behalf of the plaintiff.

At 12:00 o'clock Noon Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn resumed stand for further cross examination for and in behalf of the Plaintiff.

At 3:00 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 3:10 o'clock p.m.

Now came the Trial Jury, who on being called,

each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual, /d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further testimony for and in his own behalf.

A check dated 2/26/51, in the sum of $2,725.40 payable to Husky Construction Company, signed by Mrs. Burton E. Carr was duly offered, marked and admitted as Defendants' Exhibit "L."

A statement, dated 8/16/51, in the sum of $18.00 to Nash Garage by Alaska Neon Engineering Company, was duly offered, marked and admitted as Defendants' Exhibit "M."

A freight bill, dated 12/4/50, by Alaska Railroad to Burton E. Carr, was duly offered, marked and admitted as Plaintiff's Exhibit 14.

A freight bill, dated 12/15/50, by Alaska Railroad to Burton E. Carr, was duly offered, marked and admitted as Plaintiff's Exhibit 15.

At 4:20 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 10:00 o'clock a.m. of Monday, September 29, 1952.

Now came the Trial Jury, who on being called each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual d/b/a Gothberg Construction Company, Plaintiff, versus Burton E.

Carr, and Jane Doe Carr, his wife, Defendants, was resumed.

At this time upon the Court's own motion trial continued to 2:00 o'clock p.m. this date.

Now came the Trial Jury, who on being called each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further testimony for and in own behalf.

An itemized statement, dated 2/21/51 to Nash Garage by Husky Construction Co., was duly offered, marked and admitted as Defendants' Exhibit "N" for identification.

Court directs that order admitting in evidence Defendants' Exhibit "L" be set aside and exhibit withdrawn.

A check, dated 5/9/51, sum of $73.85, payable to City Electric, signed by Mrs. Burton E. Carr with statements to Commercial Automotive Service by City Electric was duly offered, marked and admitted as Defendants' Exhibit "O."

A check, dated 4/16/51, sum of $27.25, payable to Anchorage Installation signed by Mrs. Burton E. Carr, was duly offered, marked and admitted as Defendants' Exhibit "P."

At 3:05 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 3:15 o'clock p.m.

Now came the Trial Jury, who on being called each answered to his or her name, came the respective parties, came also the respective counsel as heretofore the trial of Cause No. A-7644, entitled Victor Gothberg, individual d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr, and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further testimony for and in own behalf.

A check, dated 3/15/51, sum of $17.25, payable to Anchorage Sand & Gravel signed by Mrs. Burton E. Carr, with statements by Anchorage Sand & Gravel to "Bert Carr" attached were duly offered, marked and admitted as Defendants' Exhibit "Q."

A check, dated 6/12/51, sum of $118.40 payable to Ketchikan Spruce Mills signed by Mrs. Burton E. Carr, with two statements by Ketchikan Spruce Mills to Commercial Auto Service was duly offered, marked and admitted as Defendants' Exhibit "R."

At 3:55 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 4:05 o'clock p.m.

Now came the Trial Jury, who on being called each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr, and Jane Doe Carr, his wife, Defendants, was resumed.

Burton E. Carr, heretofore sworn, resumed stand for further cross examination for and in behalf of the plaintiff.

Charles E. Wyke, being first duly sworn, testified for and in behalf of the defendants.

At 4:40 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m. of Tuesday, September 30, 1952.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, an individual d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Charles E. Wyke, heretofore sworn, resumed stand for further cross examination for and in behalf of the plaintiff.

At 3:00 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 3:10 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, an individual d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Victor C. Rivers, being first duly sworn, testified for and in behalf of the defendants.

At 4:07 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 4:17 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respec-

tive parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Victor C. Rivers, heretofore sworn, resumed stand for further testimony for and in behalf of the defendants.

At 5:00 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 10:00 o'clock a.m. of Wednesday, October 1, 1952.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the Trial of Cause No. A-7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Victor C. Rivers, heretofore sworn, resumed stand for further cross examination for and in behalf of the plaintiff.

At 10:30 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 10:40 o'clock a.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the Trial of Cause No. 7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, Plaintiff, versus Bur-

ton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Victor C. Rivers, heretofore sworn, resumed stand for further cross examination for and in behalf of the plaintiff.

At 11:52 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the Trial of Cause No. 7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Victor C. Rivers, heretofore sworn, resumed stand for testimony for and in behalf of the plaintiff.

At 2:35 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 2:50 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the Trial of Cause No. 7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, plaintiff versus Burton E. Carr and Jane Doe Carr, his wife, defendants, was resumed.

Roy Farrar, first duly sworn, testified for and in behalf of the defendants.

Defendants rest.

Edward L. Arnell, for and in behalf of the plaintiff, moved Court for dismissal of defendants' cross-complaint on grounds the evidence is insufficient to establish the allegations of the cross-complaint. Motion denied.

Maynard L. Taylor, Jr., first duly sworn, testified for and in behalf of the Plaintiff.

Loren E. Anderson, first duly sworn, testified for and in behalf of the Plaintiff.

At 3:45 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 4:05 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the Trial of Cause No. 7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, Plaintiff versus Burton E. Carr and Jane Doe Carr, his wife, defendants, was resumed.

Loren E. Anderson, heretofore sworn, resumed stand for further testimony for and in behalf of the plaintiff.

At 4:35 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 10:00 o'clock a.m., Thursday, October 2, 1952.

Entered: Sept. 25-29-30-Oct. 1, 1952.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the above named defendant, Burton E. Carr, and for answer to the Amended Complaint adopts all of the allegations in his answer to the original Complaint and makes the same a part hereof, and in addition thereto alleges and states:

First Cause of Action

I.

He admits the allegations of paragraph I of the First Cause of Action set forth in the Amended Complaint.

II.

Defendant admits the allegations of paragraph II of the First Cause of Action set forth in the Amended Complaint.

III.

Defendant denies all of the allegations set forth in paragraph III of the Amended Complaint, except such as are admitted in his Cross-Complaint filed herein, which Cross-Complaint is hereby adopted and made a part of this answer as fully as if set out herein in full.

Second Cause of Action

Defendant denies the allegations set forth in the Second Cause of Action and the whole thereof, save and except he admits that he did request the plaintiff to construct two walls in the Southwest corner of the building to make a boiler room, but alleges the construction was so defective and faulty

that the boiler room later, when finished by the plaintiff under another contract, did not drain and there is a large bulge in one of the walls and the work was so performed under the terms of the first contract referred to in the First Cause of Action is so defective that the defendant owes the plaintiff nothing for extras as set forth in the Second Cause of Action.

Third Cause of Action

This defendant denies each, all, and every allegation set forth in the plaintiff's Third Cause of Action, save and except those specifically admitted in this answer and the original answer filed and in the Cross-Complaint, and in addition thereto alleges:

I.

That he did enter into a contract with the plaintiff on the 19th of September, 1950 for the construction of a building and did agree to pay therefor when finished $38,450.00, but he specifically alleges that the plaintiff never did finish said building and left the same in an unfinished condition, and that any suit brought to recover on this contract is prematurely filed because the contract has never been complied with on the part of the plaintiff, and that he can not maintain an action for the contract price at this time and he is therefore not indebted to the plaintiff in any sum whatsoever, on the Third Cause of Action.

Fourth Cause of Action

This defendant specifically denies each, all, and

every allegation contained in the Fourth Cause of Action and in addition thereto alleges that the plaintiff did do some extra work in the building and that the reasonable value of such extra work so done would not exceed the sum of $2,500.00 but that he does not owe the plaintiff anything for said work for the reason that he has now overpaid him for all work done and all material furnished by having previously paid him a sum in excess of $34,672.57 in cash, and paid bills that were the just obligations of the plaintiff in the sum of several thousand dollars, and has more than paid the plaintiff any and all sums that were ever due him for any work or labor performed or material furnished, and is therefor not indebted to the plaintiff in any sum on the Fourth Cause of Action.

Fifth Cause of Action

Defendant denies all of the allegations of the Fifth Cause of Action and the whole thereof and adopts all of the allegations of his answer to the Fourth Cause of Action and makes the same a part hereof, and denies that he is indebted to the plaintiff in any sum whatsoever.

Wherefore, defendant prays that the plaintiff take nothing on his First, Second, Third, Fourth and Fifth Causes of Action and that this defendant recover on his Cross-Complaint the sum of $20,000.00, as set forth therein, which Cross-Complaint is hereby made a part of this Answer as fully as if set out and re-alleged herein in full, and for such other and further relief as the Court deems just

and equitable in the premises, and for all costs of this action.

BELL & SANDERS
/s/ By BAILEY E. BELL,
Attorneys for Defendants.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 2, 1952.

[Title of District Court and Cause.]

TRIAL BY JURY CONTINUED

Now came the Trial Jury, who on being called, each answered to his or her name, except Juror, Ellen Curtiss who has reported illness in her immediate family and is excused from further service in this cause and Second Alternate Linder takes her place as a regular member of the Trial Jury, came the respective parties, came also the respective counsel as heretofore and the Trial of Cause No. A-7644, entitled, Victor Gothberg, individual, d/b/a Gothberg Construction Company, Plaintiff versus Burton E. Carr and Jane Doe Carr, his wife, defendants, was resumed.

Keith F. Young, first duly sworn, testified for and in behalf of the plaintiff.

At 11:01 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 11:12 o'clock a.m.

Now came the Trial Jury, who on being called,

each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the Trial of Cause No. A-7644, entitled Victor Gothberg, individual, d/b/a Gothberg Construction Company, Plaintiff versus Burton E. Carr and Jane Doe Carr, his wife, defendants, was resumed.

Keith F. Young, heretofore sworn, resumed stand for testimony for and in behalf of the Jurors.

Harry M. McKee, first duly sworn, testified for and in behalf of the defendants.

Loren E. Anderson heretofore sworn, resumed stand for further testimony for and in behalf of the plaintiff.

Harry M. McKee, heretofore sworn, resumed stand for further testimony for and in behalf of the plaintiff.

Copy of an excerpt from the uniform Building Code, City of Anchorage, Titled Sec. 2805 (a) Footings and Foundations was duly offered, marked and admitted as defendants' Exhibit "S".

At 12:00 o'clock Noon Court duly admonished the Trial Jury and continued cause to 1:30 o'clock p.m.

Now at this time came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, an individual dba Gothberg Construction Company, Plaintiff, versus Burton C. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

Harry M. McKee, heretofore sworn, resumed

stand for further testimony for and in behalf of the plaintiff.

A copy of an application to City of Anchorage for a building permit by Burton C. Carr was duly offered, marked and admitted as plaintiffs Exhibit 16.

Loren E. Anderson, heretofore duly sworn, resumed stand for further cross-examination for and in behalf of the defendants.

At 2:42 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 2:52 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-7644, entitled Victor Gothberg, an individual, dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, defendants, was resumed.

Victor F. Gothberg, heretofore sworn, resumed stand for further testimony for and in own behalf.

The Plaintiff rests.

Burton E. Carr, heretofore sworn, resumed stand for further testimony for and in own behalf.

The structural steel plan for subject building by Pacific Car and Foundry Company was duly offered, marked and admitted as defendant's Exhibit "T".

A City of Anchorage building permit No. 4751 dated 4/23/51 issued to Burton Carr was duly offered, marked and admitted as defendants' Exhibit "U".

Defendants rest.

Victor F. Gothberg, heretofore sworn, resumed stand for further testimony for and in own behalf.

An analysis of plans, specifications and contract documents and appraisal of subject building was duly offered, marked and admitted as defendants' Exhibit "V" for identification.

At 3:50 o'clock p.m. Trial Jury is admonished and sent to inspect the subject premises in charge of the bailiff; and cause continued until return of the Trial Jury.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, an individual, dba Gothberg Construction Company, Plaintiff, versus Burton E. Carr and Jane Doe Carr, his wife, Defendants, was resumed.

At 4:57 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m. of Monday, October 6, 1952.

Now came the Trial Jury, who on being called each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-7644, entitled Victor Gothberg, individual d/b/a Gothberg Construction Company, plaintiff, versus Burton E. Carr, and Jane Doe Carr, his wife, defendants, was resumed.

At this time on motion of Bailey E. Bell, of counsel for the defendants, defendants' case-in-chief

is re-opened for the purpose of the taking of further testimony of defendant, Burton E. Carr.

Burton E. Carr, heretofore duly sworn, resumed stand for further testimony, for and in behalf of the defendants.

Opening argument to the Jury was had by Edward L. Arnell, for and in behalf of the plaintiff.

At 2:48 o'clock p.m., Court duly admonished the Trial Jury and continued cause to 2:58 o'clock p.m.

Now came the Trial Jury, who on being called each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-7644, entitled Victor Gothberg, individual d/b/a Gothberg Construction Company, plaintiff versus Burton E. Carr, and Jane Doe Carr, his wife, defendants, was resumed.

Argument to the Jury was had by William H. Sanders for and in behalf of the defendants.

Argument to the Jury was had by Bailey E. Bell for and in behalf of the defendants.

At 4:00 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 4:10 o'clock p.m.

Entered Oct. 2, 6, 1952.

[Title of District Court and Cause.]

DEFENDANT'S OFFERED INSTRUCTION No. ONE

You are instructed that the Plaintiff has failed to make out a cause of action against the Defendant,

Burton E. Carr, in favor of the Plaintiff, on his First Cause of Action; and

On his Second Cause of Action; and,

On his Third Cause of Action; and,

On his Fourth Cause of Action; and,

On his Fifth Cause of Action; and,

You are instructed to find in favor of the Defendant Burton E. Carr, and against the Plaintiff on said causes of action.

Refused except as covered by instructions given.

Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 6, 1952.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED INSTRUCTION No. TWO, TO BE GIVEN IN LIEU OF INSTRUCTION No. THREE AS PREPARED BY THE COURT

In considering the contract between the parties for the construction of the building, you are charged that the plans and specifications admitted in evidence are a part of that contract, and each of the parties is bound to a faithful fulfillment of the provisions thereof.

By stating that each of the parties is bound to a faithful fulfillment of the provisions of the contract is meant that the Plaintiff must have fulfilled the contract as set forth in the plans and specifications and the terms of said contract.

Refused except as covered by instructions given.

Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 6, 1952.

[Title of District Court and Cause.]

DEFENDANT'S OFFERED INSTRUCTION No. FOUR

Plaintiff, to recover in this action, must prove by a preponderance of the evidence that he has performed all the terms and conditions of the contract between the Plaintiff and the Defendant.

If you find that he has not performed all the terms and conditions of the contract, which the Plaintiff has admitted in his evidence, then the Plaintiff is not entitled to recover unless he has shown substantial performance of the contract. To show substantial performance of the contract the Plaintiff must show by a preponderance of the evidence that any deviation or omission or failure to

perform in accordance with the contract, was a trivial imperfection in small detail and did not constitute a deviation from the general plan as contemplated by the contract. And you are further instructed that any omission to comply with the terms of the contract due to carelessness on his behalf, or an intentional or willful failure on the part of the Plaintiff to comply with the terms of the contract, does not constitute substantial performance. Therefore, unless you find that the Plaintiff faithfully fulfilled the terms of the contract, or that he substantially performed all of the work called for by the contract, and that any deviation or omission of any terms of the contract was not caused by carelessness or an intentional or willful act on the behalf of the Plaintiff, you must render judgment for the Defendant, Burton E. Carr.

Refused except as covered by instructions given.

Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 6, 1952.

[Title of District Court and Cause.]

DEFENDANT'S OFFERED INSTRUCTION No. THREE, OFFERED ONLY IF THE COURT REFUSES TO GIVE DEFENDANT'S INSTRUCTION No. TWO AND ALLOWS THE DEFENDANT EXCEPTION THERETO.

In considering the contract between the parties for the construction of the building, you are charged that the plans and specifications admitted in evidence are a part of that contract, and each of the parties is bound to a faithful fulfillment of the provisions thereof.

By stating that each of the parties is bound to a faithful fulfillment of the provisions of the contract is meant that the Plaintiff must have fulfilled the contract as set forth in the plans and specifications and the terms of said contract, or, there must have been a substantial compliance with the provisions of said contract. By a substantial compliance with all of the provisions of said contract, you are instructed that, substantial compliance means: That, there is a substantial performance of such a contract where all the essentials necessary to the full accomplishment of the purpose for which the thing contracted for has been constructed or performed with such an approximation to complete performance, that the owner obtains substantially what he called for by the contract. It is essential to its application that the contractor must have acted in good faith and has unintentionally failed.

The rule cannot be invoked where the failure to perform is willful, intentional, or due to carelessness, and if the contractor, the Plaintiff herein, has failed in any way to perform the contract and has failed to act in good faith therein, or that he failed to perform intentionally or was careless in failing to perform, then he cannot recover anything in this action, and your judgment must be for the Defendant.

Refused except as covered by instructions given.

Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 6, 1952.

[Title of District Court and Cause.]

TRIAL BY JURY CONTINUED

Now came the Trial Jury, who on being called each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-7644, entitled Victor Gothberg, individual d/b/a Gothberg Construction Company, plaintiff versus Burton E. Carr, and Jane Doe Carr, his wife, defendants, was resumed.

Closing argument to the Court was had by Edward L. Arnell, for and in behalf of the plaintiff.

Whereupon the Court reads its instructions to the Trial Jury, and R. E. Manchester and B. L. Willis were duly sworn by the Deputy Clerk as bailiffs in charge of said Jurors and at 5:20 o'clock p.m., the Trial Jury retired in charge of their sworn bailiffs, for deliberation with instructions for a sealed verdict.

Entered Oct. 6, 1952.

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

It now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors you obligated yourselves by oath to try well and truly the matters at issue between the plaintiff and the defendant in this case, and a true verdict render according to the law and the evidence as given you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court, even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the facts in the case, applying thereto the law as declared to you by the Court in these instructions, and

your decision thereon as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

1.

This is an action brought by the plaintiff, Victor Gothberg, an individual doing business as the Gothberg Construction Company, against the defendant, Burton E. Carr, his wife, Marie Carr, Jack Akers and Sherman Johnstone. By order of the Court heretofore made, the action has been dismissed as to the defendants Marie Carr, Jack Akers and Sherman Johnstone, and as a consequence thereof, Burton E. Carr is now the sole defendant in the action.

The plaintiff asserts that this action is based upon two written contracts and three alleged oral contracts for the construction of a building, the building itself and additional finish work and other work pursuant to changes in the original plans whereby the plaintiff asserts that there became due and owing to him from the defendant a total sum of $51,-779.16, upon which the defendant has paid the sum of $34,605.00, leaving a balance due, owing and unpaid from the defendant to the plaintiff in the amount of $17,174.16.

The plaintiff asserts that the first contract between plaintiff and defendant related to the construction of a foundation for the building afterwards erected thereon; that the foundation had

been built by others but by reason of some City ordinance it was required that the foundation of the building to be constructed be moved further to the rear of the lot and that as a consequence, it was necessary to move the front part of the foundation to the rear, a distance of about 12 feet, and to build a new rear foundation approximately 12 feet further toward the back end of the lot than was the foundation originally built; that although a written contract was entered into between the parties to do foundation work for the compensation of $2,542.00, such changes were made by oral agreement as to result in a final price of $4,051.84, which is claimed by the plaintiff for that part of the work. This last figure is in error by $50.00 and should be $4,001.84.

After beginning the trial of this action the plaintiff filed herein an amended complaint embracing five separate causes of action covering the different features of the contracts and agreements between the plaintiff and defendant. In the first two causes of action contained in the amended complaint, the plaintiff refers to the contract of May 25, 1950, for construction work on the foundation at the agreed value of $2,542.00 and asserts, in his second cause of action, that at the instance and requests of defendant, the plaintiff performed additional work thereon of the value of $1,459.84, thus making the total of $4,001.84 hereinbefore referred to.

It further appears from the plaintiffs amended complaint and from the evidence that a written contract was made between plaintiff nad defendant

for the construction of a building on the foundation above mentioned at an agreed cost of $38,450.00 with provision for possible additional work; that after the signing of the contract, which embraced by reference plans and specifications, the plaintiff performed additional work on the building partly in the nature of finishing work and partly by reason of changes agreed upon by the parties, so that eventually, the total charge of the plaintiff to defendant for all of such work amounted to $47,722.32. This sum added to the plaintiff's charge against the defendant for the foundation work brings the total claimed by plaintiff, as shown above, to $51,779.61, on which has been admittedly paid the sum of $34,605.00, leaving a balance due and owing from defendant to plaintiff, as asserted by plaintiff, in the amount of $17,174.16.

The defendant, in his answer and cross complaint and in his answer to the amended complaint, which by reference also embodies the cross complaint, asserts that the only contract between plaintiff and defendant with respect to the foundation was a written contract calling for payment of $2,542.00, that all this has been paid and hence there is nothing due from the defendant to the plaintiff upon the plaintiff's claim for compensation having to do with the foundation of the building. With respect to this subject, you will recall that the defendant has stated that a part of the work done in the basement boiler room is to be considered as extra work and not included in the construction price of the building of $38,450.00 provided in the contract,

but the defendant further stated that such extra work was not worth more than $250.00.

The defendant in his answer and cross complaint and his answer to the plaintiff's amended complaint, alleges that he has paid to the plaintiff on the contract for the construction of the building several sums amounting in all to $34,672.57; and that the defendant further paid out various sums to do work on the building and furnish material therefor which was required to be done by the plaintiff under the contract. The defendant further avers in the cross complaint and in his testimony in support thereof, that the plaintiff failed and refused to perform many items of work and labor and failed to supply certain materials which, the defendant asserts, plaintiff was bound to perform, supply and furnish under the terms of the contracts; that the plaintiff failed to do much of the work on the building in a good and workmanlike manner; and that as a result of all of these violations of contract on the part of plaintiff, the defendant has been damaged in the sum of $20,000.00.

The plaintiff denies the affirmative averments of defendant's cross complaint and amended answer.

When you retire to consider of your verdict you will take with you to the jury room the pleadings in this action consisting of the plaintiff's amended complaint and the answer and cross complaint filed by and on behalf of the defendant and his answer to the amended complaint, so that you may, if you wish, read these pleadings and thus perhaps gain

a clearer concept of the various claims and contentions of the parties, one against the other.

However, you should remember that pleadings are in no sense evidence. You should not consider any pleading as evidence that the pleader is entitled to what he claims. The pleadings merely serve the purpose of setting forth the claims and contentions of the parties and if any assertion or feature of any pleading is not supported by sufficient evidence, it should be disregarded entirely. Your decision in this case must be based as to the facts upon the testimony given in open court and the other evidence presented to you in open court, and also, as to the law only, upon instructions of the Court. You have been permitted during the trial to view the premises in dispute, and accordingly you may also consider the knowledge you have gained by such inspection, but in considering that knowledge, you must remember that a considerable period of time has elapsed, approximately 1½ years, since the building went into the possession of the defendant, and hence, allowance must be made for natural changes which would take place during that period even if all of the work contemplated by the contracts between the parties was done in good and workmanlike fashion.

2.

In a civil case, such as this is, the burden of proof rests upon the party holding the affirmative with respect to any issue, and under that rule he is required to prove such issue by a preponderance of the evidence. By a preponderance of the evidence is

meant the greater weight of the credible evidence, that evidence which in your judgment is the better evidence and which has the greater weight and value and the greater convincing power. This does not necessarily depend on the number of witnesses testifying with respect to any question of fact, but it means simply the greater weight or the greater value and convincing power and which is the most worthy of belief; and so, after having heard and considered all the evidence in the case on any issue, you are unable to say upon which side of that issue the evidence weighs the more heavily, or if the evidence is evenly balanced on any particular issue in the case, then the party upon whom the burden rests to establish such issue must be deemed to have failed to prove it.

Under the rule above stated, the burden is upon the plaintiff to prove the material averments of his amended complaint by a preponderance of the evidence. Similarly, the burden is upon the defendant to prove the material averments of his cross complaint by a preponderance of the evidence.

3.

In considering the contract between the parties for the construction of the building, you are charged that the plans and specifications admitted in evidence are a part of that contract and each of the parties is bound to a faithful fulfillment of the provisions thereof.

There is nothing in the law to forbid the parties to such a contract to modify the terms thereof including the plans and specifications by oral agree-

ment and if you should find from the evidence that any term or provision or item of the contract, including the plans and specifications, was, after the signing of the contract, changed or modified by oral agreement of the parties, then you must give effect to such changes or modifications in the verdict which you will render in this case.

By stating that each of the parties is bound to a faithful fulfillment of the provisions of the contract, it is meant that there must be a substantial, rather than literal, compliance with the provisions of such contract. "Substantial compliance", with reference to contracts, means, that although the conditions of the contract have been deviated from in trifling particulars not materially detracting from the benefit the other party would derive from a literal performance, he has received essentially the benefit he expected.

3-A

With further reference to substantial performance of the contracts, there is a substantial performance where the variance from the specifications of the contracts is relatively trivial and unimportant and is one by which the building and structure as a whole is not impaired and where the building and structure is actually used after it is erected for its intended purpose and where the defects can be remedied by the owner without any great expenditure and without material damage to other parts of the property and may without injustice be compensated for by deductions from the contract price. On the other hand, to constitute substantial performance,

a general adherence to the plans prescribed is not sufficient and the contract is not substantially performed if the builder willfully, carelessly or in bad faith fails in his duty of performance or leaves his work incomplete in any substantial and material respect or makes deviations and omissions without the consent of the owner that affect a large saving to himself and a consequent damage to the owner, or which are so substantial as not to be capable of remedy and an allowance out of the contract price will not give the owner essentially what he contracted for.

3-B

If you find under the law as stated in these instructions that the plaintiff failed to perform substantially any of the several contracts, whether written or oral, here sued upon by plaintiff in his five separate causes of action as stated in his amended complaint, and did not substantially perform and carry out such contract, the plaintiff is not entitled to recover anything whatever on such contract which has not been substantially performed.

4.

In the plaintiff's second, fourth and fifth causes of action, he claims compensation for work done and material furnished not covered by the written contracts between the parties which are dated May 25, 1950 and September 19, 1950, the earlier one concerning the foundation of the building and the latter the construction of the main building itself. The amount claimed in the second cause of action

is $1,459.84 and in the fourth cause of action $5,351.74 and in the fifth cause of action $3,925.00. You should consider the evidence in support of and against the averments contained in these causes of action just the same as you consider the evidence upon the first and third causes of action. If you find that the plaintiff has proved by a preponderance of the evidence the material averments of his amended complaint with respect to any or all of these causes of action, you should give credit to the plaintiff in your verdict accordingly. The claims of the plaintiff based upon alleged oral contracts are to be considered just as carefully as those based upon the written contracts submitted in evidence. If you find that the plaintiff has failed to support any of his claims against the defendant stated in any of his causes of action by a preponderance of the evidence then the plaintiff is not entitled to recover thereon as to the cause or causes of action so failing of support by a preponderance of evidence, and your verdict should be for the defendant thereon, in whole or in part, as the evidence justifies. The plaintiff should be allowed credit for that part or portion of his claim or demand, as respects any of his causes of action, that has been proved by a preponderance of the evidence, but not for any part or portion not so proven. This instruction is subject to the foregoing instructions, especially 3-B with respect to substantial performance of contracts.

5.

It is your duty to determine upon all of the evidence and upon these instructions of the Court as

to the law, whether the defendant is justly indebted to the plaintiff and if so, in what amount, or whether the defendant is entitled to recover from the plaintiff damages and if so, in what sum.

You are charged that if the plaintiff substantially and faithfully performed his contracts made with the defendant you should return a verdict for the amount you find justly due him. Of course, the plaintiff is not entitled to the full amount claimed if he failed to do all of the work or furnish all of the materials which he contracted to do and furnish and you should make adjustments accordingly.

In like manner, you should consider the claims of the defendant as stated in the evidence offered in support of the averments of his answer and cross complaint, and if you find from the evidence that the defendant is entitled to recover from the plaintiff damages arising from the failure of plaintiff to do the work and furnish the materials specified in the contracts, whether written or oral, then such damages should be deducted from any amount which you might find otherwise due to the plaintiff, and if those damages exceed the amount, if any, which you might find would otherwise be due to the plaintiff, a verdict should be rendered in favor of the defendant for the balance. It is your duty, as you know, to do equal justice between the parties to the action and you are the sole judges of all of the facts of the case.

6.

As stated in the complaint, the plaintiff claims that there is due, owing and unpaid to him from

the defendant the sum of $17,174.16, together with interest thereon at the rate of six per cent per annum from the first day of March, 1951.

If the plaintiff is entitled to recover from the defendant in any sum, he is also entitled to recover interest on that sum from the date when the debt became due at the rate of six per cent per annum, which is the legal rate of interest in the Territory of Alaska as to debts of this nature where no specific rate of interest is set out in the contract or otherwise fixed by law.

If you find that the plaintiff is not entitled to recover any sum whatever from the defendant and that the defendant is entitled to recover any sum from the plaintiff, interest may be allowed in like manner on the amount which you find due from the plaintiff to defendant from the date upon which you find the same became due.

7.

Plaintiff's Exhibit 7 in this case is a letter dated December 28, 1950, addressed to the plaintiff by by Lorn E. Anderson, the engineer who drew the plans and specifications on behalf of the defendant. Defendant has testified that Anderson was recommended to him by the plaintiff. In his testimony, the defendant has denied that Anderson had any authority from the defendant to write the letter dated December 28, 1950.

If you find that Anderson had authority from the defendant to write such a letter and deliver it to the plaintiff, then the defendant is bound thereby to the same extent as though he had written the

letter himself. If you find that Anderson had no authority from the defendant, specific or general, to write such a letter, then the defendant is not bound by the letter. However, if you find that the defendant orally directed the plaintiff to do the work specified in the letter, the defendant would be obliged to carry out such oral agreement irrespective of the letter.

8.

All questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although every jury has the power to find a general verdict which includes questions of law as well as of fact, you are not to attempt to correct by your verdict what you may believe to be errors of law made by the Court.

All questions of fact,—unless so intimately related to matters of law that a determination must be made thereon by the Court as questions of law—must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will

attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

9.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence

which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

10.

While you are not justified in departing from the rules of evidence as stated by the Court, or in disregarding any part of these instructions, or in deciding the case on abstract notions of your own, or in being influenced by anything except the evidence or lack of evidence as to the facts of the case, and the instructions of the Court as to the law, and the inferences properly to be drawn from the facts and from the law as applied to the facts, there is nothing to prevent you from applying to the facts of this case the sound common sense and experience in affairs of life which you ordinarily use in your daily transactions and which you would apply to any other subject coming under your consideration and demanding your judgment.

11.

During the trial of a case, it may be suggested or argued that the credibility of a witness has been "impeached." To "impeach" means to bring or throw discredit on; to call in question; to challenge; to impute some fault or defect to.

The credibility of a witness may be impeached by the nature of his testimony, or by contradictory evidence, or by evidence affecting his character for truth, honesty or integrity, or by proof of his bias,

interest or hostility, or by proof that he has been convicted of a crime. The credibility of a witness may also be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the case. However, the impeachment of the credibility of a witness does not necessarily mean that his testimony is completely deprived of value, or even that its value is lessened in any degree. The effect, if any, of the impeachment of the credibility of the witness is for the jury to determine.

Discrepancies in the testimony of a witness, or between his testimony and that of others, if there be any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent mistake in recollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently, or see or hear only portions of it, or that their recollections of it will disagree. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of serious importance. Whenever it is practicable and reasonable, you will attempt to reconcile conflicting or inconsistent testimony, but in every trial you should give credence to that testimony which, under all the facts and circumstances of the case, reasonably appeals to you as the most worthy of belief.

12.

You are not bound to believe something to be a

fact simply because a witness has stated it to be a fact, if you believe from all the evidence that such witness is mistaken or has testified falsely concerning such alleged fact.

Where witnesses testify directly opposite to each other on a given point, and are the only ones that testify directly to that point, you are not bound to consider the evidence evenly balanced or the point not proved; but in determining which witness you believe on that point, you may consider all the surrounding facts and circumstances proved on the trial, and you may believe one witness rather than another if you think such facts and circumstances warrant it.

13.

The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff is entitled, adding the amounts so set down, and then dividing the total by the number of jurors, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no circumstances should you resort to that method of adjusting differences of opinion among yourselves.

14.

At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such.

It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

15.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, on considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict.

No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

16.

You are to consider these instructions as a whole.

It is impossible to cover the entire case with a single instruction, and it is not your province to select one particular instruction and consider it to the exclusion of the other instructions.

As you have been heretofore charged, your duty is to determine the facts from the evidence admitted in the case, and to apply to those facts the law as given to you by the Court in these instructions.

During the trial I have not intended to make any comment on the facts or express any opinion in regard thereto. If, by mischance, I have, or if you think I have, it is your duty to disregard that comment or opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

17.

When you retire to consider of your verdict you will take with you to the jury room the pleadings in the case, the exhibits, these instructions and two forms of verdict. You will thereupon elect one of your members foreman who is to speak for you and sign and date the verdict unanimously agreed upon. If you find for the plaintiff and against the defendant you will insert in the verdict which has been prepared for that contingency and which is marked "Verdict No. 1" the sum which you find that the plaintiff is entitled to recover of and from the defendant and your foreman will thereupon date and sign the verdict and you will return the same into Court as your verdict.

Similarly, if you find that the plaintiff is not entitled to recover any sum whatever against the

defendant, and that the defendant is entitled to recover from the plaintiff, you will insert in the form of verdict which has been prepared for that contingency and which is marked "Verdict No. 2," the amount which you find the defendant is entitled to recover from the plaintiff and your foreman will thereupon date and sign that verdict and you will return the same into Court as your verdict.

If you find that neither party is entitled to recover any sum whatever from the other, then you will still use Verdict No. 2, but will insert the word "no" in the blank space before the word "Dollars" and your foreman will thereupon date and sign the verdict and you will return the same into Court as your verdict. In this fashion you will find for the defendant and against the plaintiff but will further find that the defendant is not entitled to recover any sum whatever from the plaintiff. Under such a verdict, the defendant is entitled to recover his costs from the plaintiff but that is a matter of law with which you have no direct concern.

With your verdict you will return into Court the pleadings, the exhibits, these instructions and the form of verdict not used by you.

Dated at Anchorage, Alaska, this 6th day of October, 1952.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed October 7, 1952.

[Title of District Court and Cause.]

TRIAL BY JURY CONTINUED

Now at 10:00 o'clock a.m., came the Jury, in charge of their sworn bailiffs, who, on being called, each answered to his or her name, came also the respective parties with their respective counsel, and said Jury did present, by and through their Foreman, in open Court, their verdict in cause No. A-7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, plaintiff, vs. Burton E. Carr and Jane Doe Carr, his wife, defendants, which is in words and figures as follows, to-wit:

[Title of District Court and Cause.]

VERDICT No. 1

We, the jury, duly sworn and impanelled to try the above entitled cause, do find for the plaintiff and against the defendant and do further find that the plaintiff is entitled to recover of and from the defendant the sum of Fourteen Thousand Two Hundred Fifty and 82/100 Dollars ($14,250.82), together with interest thereon at the rate of six per cent (6%) per annum, from the 1st day of March, '51.

Dated at Anchorage, Alaska, this 7th day of October, 1952.

/s/ NEVIN H. BARNARD,
Foreman.

[Endorsed]: Filed October 7, 1952.

[Title of District Court and Cause.]

VERDICT No. 2

We, the jury, duly sworn and impanelled to try the above entitled cause, do find for the defendant and against the plaintiff and do further find that the defendant is entitled to recover of and from the plaintiff the sum of Eight Thousand One Hundred Thirty-One and 63/100 Dollars ($8,131.63), together with interest thereon at the rate of six per cent (6%) per annum from the 1st day of March, 1951.

Dated at Anchorage, Alaska, this 7th day of October, 1952.

/s/ NEVIN H. BARNARD,
Foreman.

[Endorsed]: Filed October 7, 1952.

Which verdict the Court ordered filed and discharged the Jury to report at 10:00 o'clock a.m. of Friday, October 10, 1952.

Entered October 7, 1952.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

Comes now the Defendant, Burton E. Carr, he having heretofore at the close of the testimony and the trial hereof, moved the Court to direct a verdict in his favor to the effect that the Plaintiff could not recover due to the fact that he had not complied with the terms of the contracts involved, either literally or by a substantial performance, which motion was denied, and the case was submitted to the jury, and thereafter, two (2) verdicts were rendered in the case, one (1) in favor of the Plaintiff, and one (1) in favor of the Defendant. That the verdict rendered for the Plaintiff is contrary to law and is not justified by the evidence and was rendered against the Defendant after he had moved for a dismissal of the Plaintiff's causes of action, and had also moved the Court to instruct the jury to return a verdict in favor of the Defendant, on all five of the Plaintiff's purported causes of action, and the Defendant now moves that a Judgment be entered in his favor dismissing the Plaintiff's Five Purported Causes of Action, notwithstanding the verdict, on the following grounds, to-wit:

(a) That the motion to dismiss the Plaintiff's five purported Causes of Action, each separately moved against by the Defendant, should have been sustained by the Court for the reason that the evidence was clear to the effect that the contracts sued on had not been complied with by the Plaintiff,

either literally according to the terms of this contract, or by a substantial performance as defined by law, and, therefore, the Court should have sustained a motion to dismiss or should have sustained Defendant's offered Instructions No. 1, No. 2, No. 3, and No. 4, which were by the Court overruled, and an exception allowed to this Defendant. A copy of the Defendant's Offered Instructions Nos. One through Four are attached hereto and made a part hereof.

(b) For the further grounds that the jury found by its verdict No. Two, that the Plaintiff did not comply with the terms of its contract and rendered a verdict in favor of the Defendant for the breach of the terms of said contract in damages in the sum of Eight Thousand, One Hundred Thirty-One Dollars and Sixty-Three Cents ($8,131.63), showing conclusively the failure of the Plaintiff to perform the terms of the contract, either literally or substantially, as by law defined.

(c) That the evidence in the case does not sustain the purported verdict No. One, which verdict was in favor of the Plaintiff and against the Defendant, even if the law authorized such verdict.

This Defendant reserves the right, in the event his Motion for Judgment Notwithstanding Verdict, is denied, to apply for a new trial.

Dated at Anchorage, Alaska, this 8th day of October, 1952.

BELL & SANDERS,

/s/ By WILLIAM H. SANDERS,

* * * * * Attorneys for Defendant.

[Endorsed]: Filed October 8, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL IF FORMER MOTION BE DENIED

To: Victor Gothberg, an individual doing business as Gothberg Construction Company, Plaintiff, and Plummer and Arnell, Attorneys of record for the Plaintiff:

You and each of you will please take notice that on Monday, October 13th, 1952, at 10:00 a.m., or as soon thereafter as counsel can be heard, at the Court Room of the District Court of the Territory of Alaska, Third Judicial Division, Anchorage, Alaska, the above named Defendant, Burton E. Carr, will call up for hearing and will move the Court to vacate the verdict No. One in the above entitled cause, which verdict is in favor of the Plaintiff and against the Defendant, for the sum of Fourteen Thousand, Two Hundred Fifty Dollars and Eighty-Two Cents ($14,250.82), dated the 7th day of October, 1952, and returned into Court and filed in the above entitled cause, and will further move the Court that a judgment be entered in favor of the Defendant on each of the Five Purported Causes of Action set forth and pleaded in the Plaintiff's Amended Complaint, notwithstanding the verdict, on the grounds heretofore stated in the Defendant's Motion made at the close of the testi-

mony at the trial thereof, and for a directed verdict in his favor, after all of the evidence was in and the trial of the case had been closed as to any further testimony, and to render a judgment notwithstanding the verdict in favor of the Defendant on each and all of said Five Purported Causes of Action. And in the event the Defendant's Motion for Judgment Notwithstanding the Verdict be denied, he intends to move the above entitled Court to vacate the said verdict and set aside the same, and to grant a new trial of said cause upon the following grounds materially affecting the substantial rights of said Defendant, to-wit:

(a) That the motion to dismiss the Plaintiff's Five Purported Causes of Action, each separately moved against by the Defendant, should have been sustained by the Court for the reason that the evidence was clear to the effect that the contracts sued on had not been complied with by the Plaintiff, either literally according to the terms of this contract, or by a substantial performance as defined by law, and, therefore, the Court should have sustained a motion to dismiss or should have sustained Defendant's offered Instructions No. 1, No. 2, No. 3, and No. 4, which were by the Court overruled, and an exception allowed to this Defendant.

(b) For the further grounds that the jury found by its verdict No. Two, that the Plaintiff did not comply with the terms of its contract and rendered a verdict in favor of the Defendant for the breach of the terms of said contract in damages in the sum of Eight Thousand, One Hundred Thirty-one

Dollars and Sixty-three Cents ($8,131.63), showing conclusively the failure of the Plaintiff to perform the terms of the contract, either literally or substantially, as by law defined.

(c) That the evidence in the case does not sustain the purported verdict No. One, which verdict was in favor of the Plaintiff and against the Defendant, even if the law authorized such verdict.

A copy of the Motion filed herein is hereto attached, marked Exhibit A, and made a part of this notice as fully as if reincorporated and set out herein.

Said motion will be presented to the Court, based upon this Notice, together with all the pleadings, papers, records and files in the above entitled action, as well as upon the minutes of the Court and the testimony adduced at the trial, including the Court Reporter's Record of all proceedings had herein.

Dated at Anchorage, Alaska, this 8th day of October, 1952.

BURTON E. CARR,
Defendant,

By BELL & SANDERS
/s/ By WILLIAM H. SANDERS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed October 8, 1952.

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICTS OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Now, comes the Plaintiff above-named and moves this Court for an order setting aside the verdicts rendered herein and for the entry of a judgment, notwithstanding such verdicts, in favor of the Plaintiff and against the Defendant, or in the alternative, for an order granting a new trial upon all issues in the above-entitled cause for the following reasons:

1. The Court erred in over-ruling Plaintiff's motion to dismiss Defendant's cross-complaint at the conclusion of the Defendant's evidence in support thereof.

2. The Court erred in denying Plaintiff's motions for a directed verdict upon the Plaintiff's first, second and fifth causes of action at the conclusion of the testimony and evidence.

3. That the Court erred in admitting into evidence Defendant's Exhibit "T" for the reason that said exhibit was not a part of the contract between the parties and was prejudicial to the case of the Plaintiff because said exhibit was not competent, relevant or material to the issues of this proceeding.

4. That the Court erred in permitting Mr. Wyke, a witness called in behalf of the Defendant, to testify as an expert, for the reason that said witness was not competent and qualified as an expert upon

the issues in this proceeding, and his testimony, being admitted by the Court over objections of the Plaintiff, was prejudicial to the Plaintiff's case.

5. That the Court erred in permitting, over objection of counsel for the Plaintiff, the Defendant and his witnesses to testify contradictory to the terms of the contract between the parties.

6. That the Court erred in refusing the Plaintiff and his witnesses to testify regarding the effect of construction trade customs and practices relating to Defendant's use and occupancy of the building before completion, the exclusion of such testimony being prejudicial to the Plaintiff.

7. That the two verdicts returned by the jury are inconsistent under the law applied by the Court, in this case, in its instructions to the jury.

8. That verdict No. 1, in favor of the Plaintiff and against the Defendant, is contrary to the preponderance of evidence in this case because the Defendant failed to produce evidence sufficient to establish a valid defense to any of the Plaintiff's causes of action and upon the evidence before the Court, the Plaintiff, if he is entitled to recover at all, is entitled to recover the full amount of his claim as established by his evidence.

9. That verdict No. 2 is inconsistent with verdict No. 1 and also inconsistent with the law as applied to the evidence by the Court's instructions to the jury in this cause and the Defendant is not entitled to recover from the Plaintiff any sum whatsoever if the jury's verdict in favor of the Plaintiff and against the Defendant be allowed to stand.

Wherefore, the Plaintiff respectfully moves the Court to enter judgment in favor of the Plaintiff and against the Defendant, notwithstanding the verdicts herein, in the amount of Seventeen Thousand One Hundred Seventy-Four and 16/100 Dollars ($17,174.16) and that the verdict in favor of the Defendant and against the Plaintiff be set aside as contrary to the evidence herein and as being inconsistent with the laws applicable to the issues of this proceeding or that the Court, in the alternative, set aside both verdicts and grant a new trial to the Plaintiff upon all issues in this cause.

PLUMMER & ARNELL,
/s/ E. L. ARNELL,
Attorneys for Plaintiff

[Endorsed]: Filed October 13, 1952.

[Title of District Court and Cause.]

M. O. RE FILING OF MOTION FOR NEW TRIAL

Now at this time upon the motion of Bailey E. Bell, of counsel for defendants, It Is Ordered that defendants in cause No. A-7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, plaintiff vs. Burton E. Carr and Jane Doe Carr, his wife, defendants, be and they are hereby given leave to file motion for new trial without waiving any rights in Re. pending action.

Entered October 13, 1952.

[Title of District Court and Cause.]

HEARING ON MOTION FOR DEFENDANT JUDGMENT NOTWITHSTANDING VERDICT

Now at this time hearing on motion for defendant judgment notwithstanding verdict in cause No. A-7644, entitled Victor Gothberg d/b/a Gothberg Construction Company, Plaintiff, vs. Burton E. Carr, et al., Defendants, came on regularly before the Court, Edward Arnell, appearing for and in behalf of the plaintiff, and Bailey E. Bell, appearing for and in behalf of the defendant.

Argument had by both sides.

Decision reserved.—Entered: March 20, 1953.

[Title of District Court and Cause.]

M. O. DENYING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT; MOTION TO SET ASIDE VERDICTS, OR IN THE ALTERNATIVE, FOR A NEW TRIAL

Now at this time arguments in cause No. A-7644, entitled Victor Gothberg, an individual, d/b/a Gothberg Construction Company, Plaintiff, vs. Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, Defendants, having been had heretofore and on the 20th day of March, 1953, and decision reserved,

Whereupon the Court now denied all motions and finds that plaintiff will recover from the defendant the difference between the amounts of the two verdicts and plaintiff to submit written judgment accordingly.—Entered: March 27, 1953.

In the District Court for the Territory of Alaska, Third Division

No. A-7644

VICTOR GOTHBERG, an individual doing business as Gothberg Construction Company,
Plaintiff,

vs.

BURTON E. CARR and MARIE CARR,
Defendants.

JUDGMENT

The above entitled cause having duly come on for trial before Judge Anthony J. Dimond and a jury in the District Court, Third Division, Territory of Alaska, on the 22nd day of September, 1952, and the Plaintiff having appeared personally and by his attorneys, Plummer & Arnell, and the Defendant, Burton E. Carr, having appeared personally and by his attorneys, Bell & Sanders, and both sides having been heard, and the jury having returned, upon Plaintiff's complaint, a verdict in favor of the Plaintiff and against the Defendant, in the amount of Fourteen Thousand Two Hundred Fifty and 82/100 Dollars ($14,250.82), and, upon Defendant's cross complaint, a verdict in favor of the Defendant and against the Plaintiff for Eight Thousand One Hundred Thirty-one and 63/100 Dollars ($8,131.63); and both parties heretofore having filed certain motions, which are contained in the records of this cause, and the Court having heard arguments thereon and each and all of said motions having been denied,

Now it is,

Adjudged and Ordered:

1. That the Plaintiff, Victor Gothberg, do recover of the Defendant, Burton E. Carr, the sum of Six Thousand One Hundred Nineteen and 19/100 Dollars ($6,119.19), said sum being the difference in favor of the Plaintiff between the verdicts returned by the jury, together with interest upon said sum at the rate of Six per cent (6%) per annum from the 1st day of March, 1951.

2. That the Plaintiff recover his costs to be taxed by the Clerk of this Court pursuant to the Federal Rules of Civil Procedure.

3. That neither party be allowed attorneys' fees.

4. That the Plaintiff, upon the notice of garnishment returned herein on the 19th day of May, 1952, recover judgment against Jack Akers and Sherman Johnstone, in the amount of Plaintiff's judgment and said garnishee defendants are hereby required to forthwith pay said sum to the Clerk of this Court, out of the money under their control and that thereupon they be discharged as garnishees herein.

5. That execution issue therefor.

Made and ordered entered this 10th day of April, 1953.

/s/ ANTHONY J. DIMOND,
District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed April 10, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Victor Gothberg, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 10th day of April, 1953.

/s/ E. L. ARNELL,
Attorney for Plaintiff-Appellant.

Acknowledgment of Service attached.
[Endorsed]: Filed May 8, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now the Defendant, Burton E. Carr, and Jack Akers and Sherman Johnstone, judgment debtors in the above entitled cause, and file this their Notice of Appeal from the final judgment rendered herein on the 10th day of April, 1953. Said appeal to be taken from this Court to the United States Court of Appeals, Ninth Circuit, at San Francisco, California.

BELL & SANDERS
/s/ By BAILEY E. BELL,
Attorneys for Defendant-Appellee.

Acknowledgment of Service attached.
[Endorsed]: Filed May 8, 1953.

[Title of District Court and Cause.]

M.O. FIXING SUPERSEDEAS BOND ON APPEAL

Now at this time on Court's own motion,

It Is Ordered that Supersedeas bond in cause No. A-7644, entitled Victor Gothberg, an individual d/b/a Gothberg Construction Company, plaintiff, vs. Burton E. Carr and Jane Doe Carr, his wife, defendants, be, and it is hereby, fixed at $7,500.00.

Entered May 8, 1953.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellant will rely upon appeal are:

1. That the Court erred in denying appellant's motion for a directed verdict upon appellant's first, second, and fifth causes of action at the conclusion of the testimony and evidence.

2. That the Court erred in denying appellant's motion to dismiss appellee's cross-complaint at the conclusion of appellee's evidence in support thereof.

3. That the Court erred in entering, over appellant's objections thereto, judgment based upon the two verdicts herein for the reasons that said judgment is contrary to the evidence and contrary to law.

4. That the Court erred in denying appellant's motion for judgment, notwithstanding the verdicts or in the alternative for a new trial for the reasons:

(a) The verdicts are inconsistent.

(b) Verdict Number 1 is contrary to the evidence and appellant is entitled to recover the full amount of his claim.

(c) Verdict Number 2 is inconsistent with Verdict Number 1, and appellee is not entitled to recover against appellant.

5. That the Court erred in admitting, over appellant's objection, in evidence appellee's exhibit "T" for the reason that said exhibit was not part of the contract between the parties and was incompetent and prejudiced.

6. That the Court erred in permitting, over appellant's objections, the appellee and his witnesses to testify contradictory to the terms of the written contract between the parties.

7. That the Court, to appellant's prejudice, erred in excluding appellant's evidence of construction trade customs and practices relating to appellee's acceptance of the building by using and occupying the same.

/s/ E. L. ARNELL,
Attorney for Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed July 29, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, M. E. S. Brunelle, Clerk of the above entitled Court, do hereby certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure and pursuant to designation and stipulation of counsel, I am transmitting herewith the original papers in my office dealing with the above entitled action or proceedings, and including specifically the complete record and files of such action, including the bill of exceptions setting forth all the testimony taken at the trial of the cause and all of the exhibits introduced by the respective parties, such record being the complete record of the cause pursuant to the said designation and stipulation.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above entitled cause by the above entitled Court on April 10, 1953, to the United States Court of Appeals at San Francisco, California.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court for the Territory of Alaska, Third Division.

In the District Court for the District of Alaska,
Third Division

No. A-7644

VICTOR GOTHBERG, an individual doing business as Gothberg Construction Company,
Plaintiff,

vs.

BURTON E. CARR and MARIE CARR,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Anchorage, Alaska, September 22, 23, 24, 25, 29, 30, October 1, 2, and 6, 1953.

Before Honorable Anthony J. Dimond, United States District Judge, and a jury.

Mr. Edward L. Arnell, Attorney for Plaintiff.
Mr. Bailey E. Bell, Attorney for Defendants.
Mary Keeney, Court Reporter. [1*]

On Monday, September 22, 1952, the above entitled matter came on regularly for trial in open court at Anchorage, Alaska, before The Honorable Anthony J. Dimond, United States District Judge.

The plaintiff appeared in person with his counsel, Mr. Edward L. Arnell.

The defendants appeared in person with their counsel, Mr. Bailey E. Bell.

A jury was duly selected, impaneled and sworn.

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* Page numbering appearing at the top of page of original Reporter's Transcript of Record.

Opening statement was made by counsel for the plaintiff.

Mr. Bell: May it please your Honor and counsel in the case.

Court: Mr. Bell.

Mr. Bell: One of the defendants, Mrs. Carr, I noticed was not mentioned by Mr. Arnell and she has not signed the [3] contract and is not a party to any of the contracts and I presume that it may be dismissed as against her.

Mr. Arnell: There has been no dismissal yet.

Mr. Bell: I will move to dismiss it at this time so that I won't have to make any statement for her.

Court: Without objection, the action will be dismissed as to the defendant Marie Carr. Is there objection?

Mr. Arnell: There is objection, your Honor. We don't know the true situation with respect to the title of the property or contracts.

Court: Order will be set aside then temporarily until we find out what the situation is.

Opening statement was made by counsel for the defendants.

Court: Witness may be called on behalf of the plaintiff.

Mr. Arnell: At this time, your Honor, I would like to ask Mr. Bell to produce the original contract, the first contract that was signed by the parties.

Mr. Bell: Didn't I give it to you, Ed?

Mr. Arnell: No.

Mr. Bell: A copy is attached to my cross-com-

plaint, your Honor. I will give him the original if I have it here.

Mr. Arnell: If your Honor please, it is my intention to offer these as exhibits without submitting them to the witness—in conformity——

Mr. Bell: That is in conformity with the agreement, your [4] Honor. I have no objection.

Mr. Arnell: At this time, your Honor, we offer as plaintiff's exhibit No. 1, a contract between Gothberg Construction Company, signed by Victor F. Gothberg and Mr. Carr, the date of the contract being the 24th day of May, 1950. This is not signed.

Mr. Bell: I will get you one that is signed. I thought I gave you one. I am sorry. Ed, you must have the original—that is the only one we have there. We will admit that Burton Carr signed it.

Court: The instrument offered may be without objection admitted in evidence as plaintiff's exhibit No. 1, and it is admitted that it is one of the contracts. Is it the first contract?

Mr. Arnell: The first contract.

Court: The first written contract entered into between the parties. I think it should be read so the jury knows what it is about. That is a contract of what date?

Mr. Arnell: May 24, 1950.

Court: And it is signed by the plaintiff and by Mr. Carr, one of the defendants. Is that correct?

Mr. Bell: It was signed by Burton E. Carr.

Mr. Arnell: This does not bear the signature of Mr. Carr.

Court: The jury will understand that Mr. Carr signed the original contract. [5]

Mr. Bell: Yes, we admit that, your Honor.

Court: In fact, as I understand counsel for the defendant, the defendant has pleaded that that contract was entered into.

Mr. Bell: That's right. I attached a copy to my pleadings.

Court: Yes. It will take some time, ladies and gentlemen, to read these contracts but I am afraid nobody will understand the subject unless they know what contracts were made in the beginning.

Mr. Arnell: Ladies and gentlemen, this contract between Mr. Gothberg and Mr. Carr is identified as plaintiff's exhibit No. 1.

Exhibit No. 1 was then read by counsel for the plaintiff.

Mr. Arnell: At this time may it please the court, I would like to offer as an exhibit on behalf of the plaintiff a contract dated the 19th day of September, 1950, between Mr. Gothberg and Mr. Carr. This appears to be an original contract signed by both parties.

Mr. Bell: I have no objection, your Honor.

Court: Without objection it is admitted and may be read to the jury—plaintiff's exhibit No. 2. This contract is dated September, 1950?

Mr. Bell: That's right, your Honor.

Court: And the other one was dated May 24, 1950? [6]

Mr. Bell: Yes.

Plaintiff's Exhibit 2 was then read by counsel for the plaintiff.

Mr. Arnell: At this time, your Honor, pursuant to the understanding that was arrived at in Chambers this morning, I would like to offer as an individual exhibit the first plan that was drawn by Mr. Anderson, the date of that plan being April 5, 1950, and the proffered exhibit being designated as BCG1.

Mr. Bell: Your Honor, the same is in your office. I object to it for the reason we don't seem to have anything like that in our plans. If we do we have no objection at all. These are all initialed by Mr. Gothberg that we have and if we have it we have no objection to it at all, but we just don't seem to have that particular one. Your Honor, I don't believe it would be admissible anyway, because I think that is the plan that was possibly a plan that was started with by Breeden and Smith, and then there was a revised plan that was the first plan that these people had anything to do with, so therefore, unless it is identified, we sure object to it because we don't have a copy of it.

Court: Unless it is identified——

Mr. Arnell: It is already identified in the contract, your Honor, as BCG1, dated April 5, 1950.

Court: Counsel for defendants were shown it this morning. [7] I thought it was agreed that this is one of the papers in the case. My understanding was that counsel reserved possible objection to that one because they were not able to find a copy of it and they were relying upon it. I believe it is

necessary to identify it and show it as a paper in the case before admitting it in evidence.

Mr. Arnell: I will call Mr. Gothberg then.

Court: Mr. Gothberg may be sworn.

VICTOR F. GOTHBERG

was called as a witness and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Arnell): Mr. Gothberg, will you state your full name, please?

A. Victor F. Gothberg.

Q. Are you the Victor F. Gothberg whose name appears in the two contracts which have been admitted into evidence here? A. That's right.

Q. Mr. Gothberg, I hand you a sheet of paper and ask you whether you can identify it.

A. I do.

Q. Will you state to the court and to the jury what that document is?

A. This plan covers the specification which was introduced for evidence and covered this plan. That was the work I figured—Four hundred twenty-five and forty—something like that—to [8] revise the wall in the front, move that back twelve feet and also move the wall in the back back twelve feet. That is a lot of trouble for $2500.

Q. Are you personally acquainted with Mr. Anderson, whose name appears on the document?

A. I am.

Q. According to the information given to you,

(Testimony of Victor F. Gothberg.)

was that paper—was that prepared by Mr. Anderson to control the revision of the foundation portion of the building?

A. At the time this was the only plan that was had.

Mr. Bell: Object to him testifying hearsay as to what Mr. Anderson said or what Mr. Anderson did unless he saw it—unless he knows Mr. Anderson drew it.

Court: Overruled.

Mr. Arnell: We wish to renew our offer, your Honor.

Mr. Bell: Object to it as incompetent, irrelevant and immaterial and not within the issues and not properly identified. The engineer is in the room that is supposed to have drawn it.

Court: Where did you first see it, Mr. Gothberg?

Mr. Gothberg: Mr. Carr brought it up to me to figure the job.

Court: Mr. Burton Carr, the defendant?

Mr. Gothberg: That's right.

Court: He is the one that provided it for you?

Mr. Gothberg: He is the one that provided the man for me. [9]

Court: Objection is overruled then. It may be admitted and marked plaintiff's Exhibit 3. What short description can you give of it?

Mr. Gothberg: Foundation plan.

Mr. Arnell: It is identified in the contract, your Honor, as BCG1.

Court: You better ask the witness that. Is that

(Testimony of Victor F. Gothberg.)

identified in the contract by some numeral or number or letter—or don't you know?

Mr. Gothberg: I believe that is the same number called for in the specification for that particular job.

Court: What notation is on it? What lettering or numbering does it bear?

Mr. Gothberg: BCG1.

Court: Let me see that last contract. Well, the contract dated September 19, 1950, says in part and I quote: "The following is an enumeration of the drawings. BCG1 Foundation Revision. Date: 4-5-50." Will you state whether or not plaintiff's Exhiibt No. 3 is a copy, or what do you call that sketch?

Mr. Gothberg: Plan.

Court: The plan that you just had is the same to your knowledge as BCG1 mentioned in plaintiff's Exhibit 2—this contract of September 19th?

Mr. Gothberg: I wouldn't know if that is the same as that is the only plan I had to start. [10]

Court: All right.

Q. Mr. Gothberg, I have handed you some more documents. Will you state whether or not you can identify them?

A. This is the complete plan to furnish the building for that contract that was signed in September.

Court: How many sheets are there?

Mr. Gothberg: We received 9 or 10——

Q. Would you look at each sheet, Mr. Gothberg,

(Testimony of Victor F. Gothberg.)

and give the identifying number on them and the date they were prepared, and by whom?

A. I'm sorry. On the first sheet the number is —I can't read it.

Q. Would you state what that plan is designated?

A. It says the drawing of the floor plan and the —and the plan been wet so that number cannot be read there but that shows just the floor plan and the installation of the hoist and so on, drawing for the floor plan and the show room.

Q. What is the date of that first page?

A. I believe it is 7-5-50 or it could be 1-5-50. It is very dim there—the 5th, anyway, 1950.

Q. Maybe we can speed this up. Mr. Bell said if he could compare them we could avoid all these time-consuming questions.

Court: The court will stand in recess for ten minutes, and ladies and gentlemen, you will remember the admonition of the court as to your duty. The court will stand in recess ten [11] minutes.

The Court then at 3:10 o'clock p.m. recessed until 3:20 o'clock p.m. at which time the following proceedings were had.

Court: Without objection the record will show all members of the jury present. Counsel may proceed with examination.

Q. Mr. Gothberg, would you state again for the jury and the court what the documents are that you have before you?

A. This is the plan that covered the entire con-

(Testimony of Victor F. Gothberg.)

struction of the building and it consists of nine sheets and it is numbered from number 2 to 10.

Q. Do you recall from whom you obtained those? A. From Mr. Carr.

Q. Do you recall the approximate date that you obtained them? A. It was in September.

Q. Approximately the date that you signed the contract?

A. Yes—no—no, that was before that.

Q. Are those the documents submitted to you by Mr. Carr that were to govern construction of the entire building? A. Repeat, please?

Q. Are those documents the ones that were to govern the construction of the entire building?

A. That's right.

Q. And you had those at the time that you figured the amount you put on the second contract. Is that right? A. That's right. [12]

Mr. Arnell: We wish to offer these in evidence.

Court: Is there objection?

Mr. Bell: May I see them—the first one especially.

Court: They may be shown to counsel for the defendants.

Mr. Arnell: This, your Honor, was an extra sheet and there is an identical one in there that has been initialed by Mr. Gothberg so I presume Mr. Bell will have no objection.

Mr. Bell: No.

Court: How many sheets are there now?

Mr. Bell: That leaves nine sheets.

(Testimony of Victor F. Gothberg.)

Mr. Arnell: This is just a duplicate of 10.

Court: How many are there now?

Mr. Arnell: Nine.

Mr. Bell: Your Honor, we have no objection to them only one of them is so badly messed up from dirt and filth that it is hard to determine and if we can find an original—Mr. Carr has gone to see if he can't find number 2, I believe it is—you can hardly read it and I would like permission of the court to substitute one that is clearer. There is another set—the one with Mr. Gothberg's initials on it we would like to substitute for number 2. We have no objection to their being introduced.

Court: They may be admitted then and if there is any clearer copy it will be considered. This will be plaintiff's Exhibit No. 4, consisting of 9 sheets—Plans of the Building. [13]

Mr. Arnell: I wonder, your Honor, if they would like these given some sub-designation so that we can refer——

Court: You can put them all in separately if you wish—4-A, 4-B, and so on. The first one will be 4-A and they will run up from there on until the whole nine have been numbered in that fashion.

Mr. Bell: Your Honor, we have a nice clean set of them all so if Mr. Arnell will agree to substitute them, it is all right with me. It will save me introducing these. Here is a very clean set. As long as there is no dispute about anything in particular they can just be used by Mr. Arnell and me both

(Testimony of Victor F. Gothberg.)

and those others may stay in if you think it is necessary, Mr. Arnell.

Mr. Arnell: I don't know which would be easier for the jury to study.

Mr. Bell: And you and I can use those here and we can substitute them if it is necessary.

Mr. Arnell: May we have the board drawn over, your Honor, so that we can place plaintiff's Exhibit No. 3 on the board?

Court: Yes.

Mr. Arnell: Perhaps the witness can just hold it and point to it as he testifies.

Court: That will be very difficult.

Mr. Bell: Your Honor, I will waive the fact that it has to come in front of me. I will go over there. [14]

Court: Mr. Carr can move over, too. Move it up a bit further so it squarely faces the jury then they can see it—and here is a light that can be thrown upon it.

Mr. Arnell: Mr. Gothberg, would you step down by the board, please?

Q. Mr. Gothberg, will you state for the benefit of the jury what portion of the building existed at the time your contract was taken to revise the foundation?

A. The existing foundation was here, the dotted line that is in front, and we extended it here in the back. And this wall was already in so the contract was to move this wall here in front—move that back twelve feet—that would be this location, and also

(Testimony of Victor F. Gothberg.)

move this from here and move this wall here also back further.

Q. Mr. Gothberg, what was the depth of the old wall that was already constructed and did not have to be moved?

A. That was the same as this—three feet. This three-foot wall and one-foot footing so the total makes it four feet deep.

Q. Now this contract that you signed—which portions did you agree with Mr. *Gothberg* that you would install under that contract?

A. I agreed to tear this down—this part, and also tear this down and build a wall there instead.

Q. Now, was there any flooring that was to go into that contract at that time? [15]

A. No.

Q. There was no concrete slab contemplated?

A. No.

Q. If you recall, Mr. Gothberg, will you state approximately when you commenced construction or demolition of the two old walls?

A. I can't remember.

Q. When did you commence work on your contract you performed which you have just described to the jury?

A. Very shortly after the contract was signed. I don't remember.

Q. What stage was that work in at the time that you signed the second contract relating to the rest of the building? A. It was all finished.

Q. When you say it was all finished, does that

(Testimony of Victor F. Gothberg.)

include some additional work? A. It did, yes.

Q. Mr. Gothberg, you have before you there on the board Exhibit 4-D, which is designated BCG5, part of the plans. Will you explain to the jury what that plan called for?

A. That is the plan that covered the partial basement for the furnace room or boiler room and that is this part here.

Q. What was the size of the basement?

A. The size is thirty-four by seventeen.

Q. And where is that basement located with reference to the [16] plaintiff's other Exhibit No. 3, that you have?

Q. That didn't show that because it wasn't on the plans.

Q. But where is that basement shown by Exhibit No. 4? A. It is right here.

Q. Approximately when did Mr. Carr ask you to install the basement?

A. It was very shortly after I had started the job.

Q. Do you recall approximately when it was?

A. I couldn't state the date. I would have to look that up.

Q. With that change would you explain to the jury what additional work was required of you to be done in order to construct the basement?

A. Instead of a four-foot wall I had to extend that to nine feet deep and also excavate this part down to eight feet, and also build the stairs down to the basement which will be here. The stairs is

(Testimony of Victor F. Gothberg.)

sown here—and also install a fire door over to the boiler room for fire prevention.

Q. Of what were the stairs constructed?

A. Concrete.

Q. And what is the thickness of the wall?

A. Eight inches.

Q. Did you have to pour a concrete slab over the basement also? A. That's right.

Q. Now will you designate, Mr. Gothberg, the specific extras [17] that you have included in your first cause of action?

A. Extend the depth of the wall approximately five feet deeper, build the stair, put in a fire door here, digging a fuel tank here for sewer disposal and for water, and furnish material and labor for doing this work. Steel, and also put a slab on top of it, which also is concrete.

Q. On the original contract, the price of $2542.00 was for the amount of work that was required under Exhibit No. 3. Is that correct?

A. That is correct.

Q. And you submitted to Mr. Carr a bill for $4,051.84?

Mr. Bell: Object to leading the witness. The question is leading and suggestive.

Court: Overruled.

Mr. Bell: Exception.

Q. What was the additional amount that you charged Mr. Carr by way of extras?

A. Approximately $1500.

Q. The $1500 included all of the work that is

(Testimony of Victor F. Gothberg.)

required by the plan which is designated BCG5, is that right? A. That is right.

Mr. Arnell: Do you want to return to the stand, Mr. Gothberg, please?

Q. Mr. Gothberg, I hand you a document and ask you to state whether or not you can identify it.

A. That is correct.

Q. What does it represent?

A. That includes the extra construction of the concrete walls and also includes for the extra work for building the boiler room.

Q. Did you deliver the original of that statement to Mr. Carr? A. I did.

Q. Do you recall the specific date on which you made the deal?

A. That was sometime in November.

Q. What is the date of the statement?

A. That's 2-23-51.

Mr. Arnell: We wish to offer the exhibit in evidence, your Honor.

Court: It may be shown to counsel for defendants.

Mr. Bell: I didn't understand when he said he delivered the statement to Mr. Carr.

Mr. Gothberg: He got one every month.

Mr. Bell: We will agree, your Honor, that the statement was delivered to us on March the 4th, 1952, and if he wants to introduce it on that agreement——

Mr. Arnell: The statement, your Honor, is dated

(Testimony of Victor F. Gothberg.)

the 23rd day of February, 1951. We ask Mr. Carr to produce the original of the statement.

Mr. Bell: He did produce this copy, your Honor, but our records show that it was delivered March the 4th, 1952. I [19] don't know that it would make any difference.

Court: You may ask the witness when, to the best of his knowledge, that statement was delivered.

Q. Was that statement, Mr. Gothberg, delivered on or about February 23, 1951?

A. That was—but he had a copy of that before. He had that in November. It only covered the foundation.

Q. When you stated, then, that he had a copy in November, you meant you had sent him a prior bill. Is that your testimony?

A. This is a copy of the first bill.

Q. And this is the final statement that you sent to him? A. Right.

Mr. Arnell: We renew our offer.

Court: The objection is overruled. It may be admitted and marked Plaintiff's Exhibit 5 and may be read to the jury.

Mr. Arnell then read Plaintiff's Exhibit 5 to the jury.

Q. Now, Mr. Gothberg, calling your attention to this exhibit which you have just identified, have you made demand upon Mr. Carr for payment of that sum? A. I have.

Q. On more than one occasion?

A. On quite a few occasions.

(Testimony of Victor F. Gothberg.)

Q. Has he paid you any portion of that money that is reflected in this statement? [20]

A. No.

Mr. Bell: Your Honor, Mr. Arnell and I both have an exact copy of the specifications except his is minus one page, and Mr. Carr has gone to get ours which has that one page in it, and I will agree he may introduce it when he is ready for it at any time, and I will furnish him that one, too, as an extra page in it.

Court: Very well.

Mr. Arnell: May it please the court then, I have offered this document, which purports to be the specifications which relate to the construction of the building involved in this action. As Mr. Bell has informed the court, there is one page missing here, but I don't think it is material. Perhaps it may be later. We can substitute later.

Mr. Bell: It will just double the exhibits and confuse the jury that two exhibits just alike will be in evidence, except that one has a page Mr. Arnell's does not have. It will just be a moment.

Court: Very well—we can wait.

Mr. Arnell: At this time, then, may it please the court, I will offer Mr. Bell's copy of the specifications.

Court: Very well. They may be admitted and marked Plaintiff's Exhibit 6. These are the specifications for the building?

Mr. Arnell: Yes, they are. [21]

Court: Well, if there is no objection, they may

(Testimony of Victor F. Gothberg.)

be considered as read because it would be tedious, useless labor to read them.

Mr. Arnell: I hope we don't have to read them.

Mr. Bell: I didn't understand you, your Honor.

Court: I said, the exhibit is admitted without objection and marked Plaintiff's Exhibit 6—Specifications for the Building—and considered as read.

Mr. Bell: That's all right.

Court: And either party may use it in their arguments.

Mr. Arnell: I hate to bring this board back again, your Honor, but I think we will have to.

Court: Do you wish the witness to step down?

Mr. Arnell: Yes, your Honor.

Q. Mr. Gothberg, calling your attention to Plaintiff's Exhibit 4-A, which is designated as BCG2 on the bottom there, would you explain as briefly as possible for the benefit of the jury with respect to the partitions, ramp, the gas pumps, the hoists, and the locker rooms, furnace room, and all other details that are shown there?

A. Included in this—to start with—on the plan, what it called for—and furthermore it called for in the specifications—the only thing I was going to do according to that was build the walls outside, all around, and get the roof on, and build this wall over to here—and then here's the [22] rest room —that is this part here—and also one over here, for men to go in and have lockers, and so on, for the clothes. That is this here. All the rest for the finish inside the building was supposed to be extra—which

(Testimony of Victor F. Gothberg.)

called for in the specifications. All finishing I had to do was this here—and this from here. All the rest was extra.

Q. Now, Mr. Gothberg, what was the original location of the ramp in front of the garage?

A. The ramp is over here. It goes out like this and follows this line here—over to here—and then he wanted also this covered with concrete so that was extra for this part here from the door.

Q. Will you explain to the jury what type of construction was required under the specifications?

A. I believe it was five-inch concrete—or maybe it was six-inch.

Mr. Bell: Object. The specifications would be the best possible evidence. They are in evidence and his opinion would not be permissible.

Court: If it is important, you had better refer to the specifications right now—otherwise it will be taken up later.

Mr. Arnell: I didn't mean to elicit the size of the blocks. Mr. Bell is right. The purpose was to elicit the type of material that was to be used in the construction.

Court: The jury will understand that the specifications [23] are the best evidence.

Mr. Gothberg: It was concrete slab reinforced with six-inch mesh.

Q. Are you referring to the ramp in front of the garage, Mr. Gothberg? A. That's right.

Q. The specifications called for six-inch wire mesh. Such wire mesh was not installed, was it?

(Testimony of Victor F. Gothberg.)

A. It was not.

Q. Did you have any discussion with Mr. Carr regarding the use or failure to use mesh?

A. I did, right.

Q. Do you recall the approximate date of that?

A. No, I don't, but that was one or two days before it was poured.

Q. Was the ramp poured early in the construction stage of the building, or later?

A. It was poured later.

Q. What discussions did you have with Mr. Carr with reference to the wire?

A. As Mr. Carr was furnishing the wire mesh —and there was nothing left of that—it just covered the floor instead, so in that case I talked to him —and I couldn't get any at the time in town— nobody had it and it would take a long time to get it from the states—so I said that I wouldn't [24] guarantee—that I would pour and there would be no cracks, or anything like that—and also pour in more concrete. I mixed some concrete in.

Q. When you say you put in more concrete, Mr. Gothberg, do you mean you made it thicker?

A. A different mix.

Q. What mix was used?

A. Five and one-half and six.

Q. Is that a stronger concrete slab construction than the other concrete would have been with the use of wire?

A. It is, yes, just as strong, anyway.

Q. Now, Mr. Gothberg, will you point out to the

(Testimony of Victor F. Gothberg.)

jury what portion of that plan which represents the show room?

A. Yes, this part here. Just about this section here.

Q. What does that dark line across the building from one sidewalk to the other represent? A partition?

A. That is the cinder block partition.

Q. Now was that type of construction used to erect that partition, Mr. Gothberg?

A. It was not.

Q. What type was used?

A. Regular frame woodwork—and asbestos siding on this side—and sheet rock on the outside—and plywood.

Q. Was the partition constructed in the same place it was called for in the plans? [25]

A. No, it wasn't. I believe it was moved to here some place. I can't remember now—but it was moved some.

Q. How high was the partition that you installed?

A. It was about twelve feet, but I could only install eight feet.

Q. Mr. Gothberg, looking at that plan, these appear to be rooms, or something. Would you describe to the jury what those are?

A. That is the sales bar. You see, they got the parts in here—so that is what they used for a counter there—and this is an office—this part is an office, and, also, this is an office.

(Testimony of Victor F. Gothberg.)

Q. When you spoke a moment ago, you referred to some finishing work, Mr. Gothberg. Would you explain to the jury what was included within the term "finishing work" under the contract and specifications?

A. Finish work is covered all inside—I believe it was—with plywood—and all the walls up to here —to this part—and this wall, I believe, is covered with plywood, if I'm not mistaken—and the same thing here, and also this one here—and this side is covered with sheet rock, and also asbestos board —and this counter—for that matter it was another party that installed that—it is mahogany, I believe, or plywood, and also this counter here.

Q. Was all of this finishing work included within the $38,000 [26] contract or outside the scope?

A. All outside.

Q. Now there are two rest rooms shown on the back wall there. Would you explain to the jury what was done with respect to the completion of those?

A. That is completed in here with sheet rock inside—and also ceiling—and the door and base —that is all finished, and included in my contract, but this part—there is three doors, which is also included in the finish, which didn't come under my contract. That is extra.

Q. Now for the benefit of the jury, Mr. Gothberg, will you show where the compressor originally was to have been installed?

(Testimony of Victor F. Gothberg.)

A. The compressor is supposed to be here. That is the compressor here.

Q. What type of compressor were you led to believe was to be installed there?

A. That was supposed to be a smaller compressor.

Q. Where was the compressor finally installed?

A. We built a platform over the stairs here, and installed it here, which costs more to bring it up there from here—more piping and so on—to go out over there.

Q. Now, you have referred to the locker room that was required by the contract. Would you point that out to the jury?

A. Right along this line here. [27]

Q. Were there any revisions or modifications of that at the request of Mr. Carr?

A. There was. And instead of going this way, it is built out from here—and also two more lockers in this part here.

Q. Now, next to the locker room, would you state what those lines are that crisscross?

A. That is the hoist—automatic hoist—for lifting the cars.

Q. What type of hoist was originally described in the specifications?

A. In the specifications it called for a rotary hoist with only one plunger.

Q. Will you elaborate what you mean by one plunger hoist?

(Testimony of Victor F. Gothberg.)

A. Just one plunger here in the middle—which goes up and down to lift the car up. Now it is installed with two plungers, one here and one here, which cannot be turned—it just lifts the car up and down. And then it was hard digging at the time—the ground was frozen—so that includes the cost of the building, and that much more digging that hole, and installing the extra plunger. We also had to pour concrete in the bottom to set the plunger.

Q. Were you to make provisions for any hoist?

A. Yes, and also make provision for this one—and the extra expense—because it provided for a two plunger hoist instead of one.

Q. Who was to furnish the hoist? [28]

A. Mr. Carr.

Q. Who was to furnish the air compressor?

A. Mr. Carr.

Q. Now, would you explain to the jury, for their benefit, Mr. Gothberg, what change in plans was made with respect to the rear portion of the building?

A. Yes, it called for windows all up to the corner here—the whole wall there was a change made. One of these windows was eliminated—and instead of that window was installed one eight-by-eight overhead door in this section here.

Q. Was that door included within the original plans? A. No.

Q. Now will you explain, Mr. Gothberg, in a little further detail, the type of construction that was used in this building?

(Testimony of Victor F. Gothberg.)

A. Yes. You mean above the door?

Q. No, I mean the building as a whole. Did you have to pour concrete piling to support the walls and roof?

A. In front there—here it called for brick, but on account of this span here—those blocks, they are not guaranteed for any weight, so to overcome this we poured three pillars, one here in this corner, and one here, and one in this corner, which also brings up the cost considerably.

Q. Was that type of construction used in any other portion of the building, Mr. Gothberg? [29]

A. No.

Q. How was the other portion of the building supported?

A. That was supported by steel column, which is inside the building—and then truckers, so the truckers goes from one beam from this end here to meet this point, which eliminates, so there won't be any bucking on the wall.

Q. Now, who furnished all of the steel, Mr. Gothberg? A. Mr. Carr.

Q. Was the steel on the job site at the time that you signed the contract, or was it obtained later?

A. It was there—supposed to be there.

Q. What type of steel was that, Mr. Gothberg?

A. Structural steel—eight inch column, and I believe the beam across was also—I believe it was twelve-inch truckers.

Q. Was that fabricated steel, Mr. Gothberg, or did it have to be fabricated on the job?

(Testimony of Victor F. Gothberg.)

A. It was fabricated in Seattle.

Q. When you say fabricated, would you explain the contractor's meaning of that term with reference to this job?

A. It is prefabricated, so when it comes to the job the only thing you have to do is put screw bolts through the beams—and all there is to do then is to put in the screws and tighten it up. All that is done in the field and all the rest is done in the shop.

Q. Now, was there a door along the east wall of the lower [30] portion——

A. There is a door here — twelve foot door. Twelve by twelve.

Q. What type of door is it, Mr. Gothberg?

A. Overhead.

Q. When you say overhead, will you explain what you mean?

A. Swinging like this—but open up like this.

Q. How does it open? A. With electric.

Q. Electric motors? A. Yes.

Q. Under the contract, did you furnish the door?

A. Yes.

Q. Now, in the installation of the door, did you have any difficulty getting the door installed?

A. I had.

Q. Will you explain to the jury what that was?

A. This beam that came here—it was a high door, too—and there was just about ten feet—and this had to be the same distance, since I had the door which was twelve feet—so I had to move this door here and move it over here to get away from

(Testimony of Victor F. Gothberg.)

interference with the door — otherwise the door wouldn't open way up.

Q. Again, is that particular beam part of the prefabricated structure?

A. That was a beam prefabricated. [31]

Q. In other words, you didn't place it in the wrong place in the beginning?

A. No, in fact, I never saw the plan for the steel structure.

Q. Mr. Gothberg, you have before you there a sheet of the plans which is designated as BCG 8, and Plaintiff's Exhibit 4-G. Will you state what that plan represents?

A. That represents extension for the marquee. This marquee come outside the building—the building wall is there and then the marquee is here.

Q. Now, is the wall that you just referred to—the one running diagonally—the one you referred to in your former testimony that you poured with concrete? A. The wall was there, yes.

Q. Is that the wall that you poured, though?

A. This wall was there and that was included in the contract.

Q. Is there any steel framing in that marquee diagram, Mr. Gothberg?

A. Yes. There is a steel beam coming this way here.

Q. To what is that tied—if anything?

A. That is tied to this cross beam here.

Q. Now, does that center beam represent one of

(Testimony of Victor F. Gothberg.)

the cross beams that run completely across the building?

A. This one runs across the building but this one goes this way—and that is a lower grade on this one so it goes underneath this. [32]

Q. In the construction of that marquee, did you run into any difficulty?

A. I did, because there was no steel beam there.

Q. When you say there was no steel beam, Mr. Gothberg, what do you mean?

A. This steel beam wasn't on the job, according to the specifications. All the steel should be on the job and furnished by Mr. Carr.

Q. Was that steel beam that you pointed out there furnished? A. No.

Q. What did you do by way of construction to substitute for that?

A. I ordered this steel beam. The steel fabricator got an office down there on Third Avenue and they installed this beam, and the cost of the beam was $500—and the installation was a little over sixty-three—and it called in my contract for the installation of this beam, but the beam should be furnished by the owner.

Q. You purchased the beam from the steel fabricators? A. I did.

Q. Did you bill Mr. Carr his portion of the cost of erecting the beam?

A. I billed him $500—the cost of the beam.

Q. Did you bill him any other sum?

A. No, not on that part. [33]

(Testimony of Victor F. Gothberg.)

Q. In other words, the $63 was a part of your own $38,000 contract? A. That's right.

Q. Now, did you have to go in and make any revision to this plan at any time during the course of construction?

A. There was many changes.

Q. I am referring now, Mr. Gothberg, particularly to this marquee construction.

A. Yes, on account of this cinder block there was enough to take care of the fuse when it come up to the roof—and that had to be also installed.

Q. Did you just install an iron beam or did you install concrete support across there?

A. I poured concrete support.

Q. Was that called for in your original contract?

A. It was.

Q. When you say you purchased another beam was that used in the cement itself? A. No.

Q. Would you state to the jury where you installed that?

A. That is installed to hold the roof joist close to this point here. That don't show on this plan but the ends of the joists runs this direction—and then there was no beam for this so an iron beam had to be installed to hold this joist. [34]

Q. Was that iron beam a part of your original contract? A. No.

Q. Was that the one you referred to that you acquired from steel fabricators—or a second one?

A. This is a second one.

Q. Where did you obtain that?

(Testimony of Victor F. Gothberg.)

A. Same place.

Q. What was the cost of that?

A. I don't remember—but it wasn't as high priced because it wasn't a big beam.

Q. Mr. Gothberg, you have before you now Plaintiff's Exhibit 4-H, which is BCG 9, a part of the plans. Would you state to the jury what that represents.

A. It represents electric alarm.

Q. Now, can you briefly point out, Mr. Gothberg, what changes were made necessary by the moving of the compressor back into the corner.

A. The compressors—well, it would take much more piping because those pipes have to come up there, anyway. It took more piping to get over to this corners—so there was some extra for that—and also to build a platform.

Q. Were there any additional air lines needed?

A. There was quite a few extra lines ordered by Mr. Carr—in fact, I got a letter from the electrician in that matter—and requested to get more lines in there than was called [35] for.

Q. Did the addition of the concrete furnace room cause any additional change in the electrical plans, as shown there?

A. Oh, yes, because there's got to be more lines—two lines, no, I believe one only, in there—in the boiler room and other pipes had to go through that.

Q. Were there any changes in wiring necessitated by reason of the change from one type of hoist to another?

(Testimony of Victor F. Gothberg.)

A. There was some changes made in the wiring —but I really couldn't make a statement what it was. There was heavier wire—I believe it was three wires—when it called for two.

Q. Did you get billed additional for the difference in the cost of the wire?

A. I got billed from the City Electric for that.

Q. Did the change in the location of the partition across the building have any additional costs, Mr. Gothberg? A. No, it really didn't.

Q. You have already described the fact that you had to move the steel beam above the door. Did that require any additional electrical work?

A. That electrical work was in already—so they had also to move the pipe over two feet.

Q. Did Mr. Carr make provision for the operation of a washing device in the building?

A. Yes. [36]

Q. Where was that located?

A. It was located in this part here.

Q. When was the location of that wash-mobile finally established?

A. I believe it is standing right there—well, I couldn't say for sure.

Q. Well, was the wash-mobile installation put in there after you revised the plan to provide for the door on the south end of the building?

A. Yes.

Q. Did the installation of that wash-mobile equipment necessitate any changes?

A. There were some changes on account of that.

(Testimony of Victor F. Gothberg.)

Q. Were they plumbing, or electrical, or both?

A. They was both—plumbing and electrical.

Q. Now, going back again for a moment to the outside ramp, Mr. Gothberg, would you point out approximately where the pump islands were originally designed for?

A. The pump island is right here.

Q. Is that the location it is in right now?

A. The location is here now. In fact, it was moved two times—or three.

Court: I think we shall have to suspend now. There are some criminal matters of pressing importance that have to be taken care of today. The trial of this case will be continued [37] until 10 o'clock tomorrow morning, and ladies and gentlemen, you will remember the admonitions to the court as to your duty. You may now retire and the court will take a recess for seven minutes.

Whereupon at 4:30 o'clock p.m., September 22, 1952, the trial of the above entitled cause was continued until 10:00 o'clock a.m., September 23, 1952.

Be it further remembered, that at 10:00 o'clock a.m., September 23, 1952, the trial by jury of the above entitled cause was resumed; the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And thereupon, the following proceedings were had:

Court: A report is that one of the jurors, R. E. Taylor, has had what is called car trouble on his way from Palmer this morning. He is expected to

(Testimony of Victor F. Gothberg.)

be in sometime this morning. I think we cannot wait for him and he will be excused from service on the jury and his place will be taken by the first alternate, Mr. Johnson. The court may call the roll of the jury.

The court then called the roll of the jury.

Clerk: Trial jury is all present, your Honor.

Mr. Arnell: If your Honor please, in order that the record might be complete on behalf of the plaintiff, I waive any objection to releasing Mr. Taylor, and approve the selection of Mr. Johnson as a regular juror instead of an alternate. I [38] discussed that possibility with Mr. Bell and assume he has no objection either.

Mr. Bell: Your Honor, we are just meeting the law when you put the alternate in his place. Of course we have no objection—couldn't have.

Court: If I were sure Mr. Taylor would be in soon I would wait for him but he may be delayed all morning and I think we are not justified. Therefore, Mr. Johnson will be asked to serve. Counsel may proceed with examination of the witness.

Q. (By Mr. Arnell): Mr. Gothberg, yesterday the name of Lorn E. Anderson was mentioned several times. Are you personally acquainted with Mr. Anderson? A. I am, yes.

Q. Did you have occasion to have any dealings with him in September and the following months of 1950? A. I had.

Q. Would you explain to the court and jury what dealings you had with him—and why?

(Testimony of Victor F. Gothberg.)

A. He was the engineer and he made the drawings—the plans—and he also supervised the job and saw to it that it was done in a workmanlike manner—and was on and inspected the job.

Court: You better repeat your answer.

Mr. Gothberg: He was the man who made the drawing for the [39] whole structure, except the steel—that was done before the job started. He was the one that supervised and had charge of it—and to see that everything was done according to plan and specification.

Q. When you say he supervised, Mr. Gothberg, you mean he was out on the job site?

A. He was out on the job — not all the time, but off and on.

Q. During the period of construction, he directed your activities? A. That's right.

Q. Did he also inspect it? A. Yes.

Q. I hand you a document, Mr. Gothberg, and ask whether or not you can identify it.

A. I do, yes.

Q. What is the date of the document?

A. December 28, 1950.

Q. By whom is it signed?

A. By Lorn A. Anderson, Engineer.

Q. Did you receive that from Mr. Anderson?

A. I did, yes.

Mr. Arnell: We wish to offer this letter, your Honor.

Mr. Bell: Object to it as incompetent, irrelevant and immaterial. It is after the time that it was

(Testimony of Victor F. Gothberg.)

stated in the opening statement that the engineer had been discharged for [40] failing to do something that met with the approval of the owners. Therefore it would not be binding upon the owner if the engineer had no authority to write it.

Court: Overruled. It may be admitted and read to the jury.

Clerk: Plaintiff's Exhibit 7.

Plaintiff's Exhibit 7 was then read to the jury by Mr. Arnell.

Court: Ladies and gentlemen of the jury, by overruling the objection and admitting that exhibit, I am not instructing you that Mr. Anderson had authority to act for Mr. Carr, but I think that until this moment the paper should be admitted and then at the close of all the evidence you will decide whether, when that letter was written, the engineer, Mr. Anderson, acted for Mr. Carr and had authority to act for him, and you will be guided accordingly in your decision as to the weight of that exhibit. Counsel may proceed.

Q. Mr. Gothberg, the first item in this exhibit is the eight by eight overhead door in the south wall. Is that the door to which your testimony yesterday referred? A. That's right.

Q. Was that order or directive of the engineer carried out by you? A. It was.

Q. And the door was installed? [41]

A. Yes.

Q. Item B directs you to remove a 3 by 6-foot, 8-inch door in the northeast wall and install a plate

(Testimony of Victor F. Gothberg.)

glass window. Would you step down and point at —would you point out where this change occurred, Mr. Gothberg, please?

A. This change was done here. They called for a door and that was eliminated—and instead it was full glass all the way through here. That was put in extra—glass here, where the door was.

Q. And Item C refers to a two by five by six slab over the boiler room stair landing?

A. It was here in the back for the air compressor. The air compressor is located here—so it was to build the platform.

Q. Was that slab installed as requested by the engineer?

A. It was requested by the engineer and also Mr. Carr.

Q. Item D refers to fuel pumps and change of position.

A. They was over even—where this post is—then was moved one time 16 inches, this way, and the next time it was moved all the way to this corner. This is where they are located now.

Q. Now Item E refers to a two-plunger hoist.

A. This is the hoist here—and there is two plungers on this one—one here and one here.

Q. Now, the two-plunger hoist was actually installed, was it? A. It was, yes.

Q. Item F of this exhibit refers to plate glass windows. Where [42] are those windows located?

A. The whole wall here—and also this one win-

(Testimony of Victor F. Gothberg.)

dow here—so the whole front there is one foot higher than called for on the plan.

Q. Would you explain to the jury where the spandrel concrete pour was. Item G in this exhibit refers to spandrel construction by pouring three columns.

A. One column here—and one column here—and one here, to get bearing for the roof joist to carry the roof. The center blocks has not bearing enough to hold up the roof. That is the reason for pouring this concrete.

Q. Was that type of construction used by you in completing the front of the building?

A. Yes.

Q. Now, were there other items that you installed, Mr. Gothberg, in addition to the items here which we have just been discussing?

A. Oh, yes, there was quite a bit more. All the trim in the whole front was extra.

Q. At the time that you received this letter from Mr. Anderson, did you discuss it with Mr. Carr?

A. Well, the most of it was installed already—so then I told Mr. Anderson I got to have a letter on it—that they really ordered it so I believed it was almost all completed at the time he wrote that letter. [43]

Q. Had you discussed these changes with Mr. Carr personally?

A. Yes, and he was the one that ordered it there, Mr. Arnell.

Q. Now, would you relate briefly for the jury,

(Testimony of Victor F. Gothberg.)

Mr. Gothberg, what the other extras are that you are claiming?

A. I don't remember them all because there was so many.

Q. You testified yesterday regarding the locker room.

A. That was extra, yes, and also built the locker room bigger than what it was called for on the plan.

Q. At whose request did you do that?

A. Mr. Carr.

Q. Did you have any discussions with Mr. Carr regarding the concrete ramp in front of the building? A. Yes, and he also wanted that.

Q. What did you do?

A. It called for concrete up to this door here —and then he wanted concrete all the way through to the corner—so that is the part there that I poured concrete—and that was at Mr. Carr's request.

Mr. Arnell: You may return to the witness stand Mr. Gothberg. Your Honor, at this time I wish to offer a statement in evidence. Mr. Bell has indicated he has no objection to it.

Mr. Bell: I have no objection

Court: Very well, it may be admitted. Plaintiff's Exhibit 8 may be read to the jury. Perhaps the jury would like [44] to know from the witness what the statement is.

Mr. Bell: Your Honor, we are not admitting it as correct. I have just agreed we received the statement.

(Testimony of Victor F. Gothberg.)

Court: I think the jury understands.

Q. Mr. Gothberg, I have Plaintiff's Exhibit 8, which has been admitted. Will you state to the jury what it is?

A. This is a bill for enlargement of the locker room—and also extensions of the concrete ramp in front—and also moving the iron beam in the ceiling above the garage door—those three items—that is the bill for that extra.

Q. Was that statement delivered to Mr. Carr?

A. It was, yes.

Mr. Arnell then read Plaintiff's Exhibit 8 to the jury.

Mr. Arnell: May it please the court, at this time I wish to offer another statement. Mr. Bell has stipulated it may be admitted, I think——

Mr. Bell: We deny the accuracy of it, but we have no objection to the statement on the theory it was served on us. A copy of it was given to us.

Court: It is admitted. Plaintiff's Exhibit 9—and may be read to the jury.

Mr. Arnell then read Plaintiff's Exhibit 9 to the jury.

Mr. Kurtz: Does that have a date?

Mr. Arnell: No, this doesn't. I can ask the witness.

Mr. Kurtz: Also for Exhibit 8. [45]

Court: Will you speak a bit louder?

Mr. Kurtz: I asked Mr. Arnell if Exhibit 9 contained a date.

Court: Exhibit 7 is dated December 28, 1950.

(Testimony of Victor F. Gothberg.)

Exhibit 8 has no date upon the paper itself. I don't recall whether the witness made any statement of date or not. Exhibit 9—the one last read—apparently has no date. I cannot see any date upon it anywhere. If the juror or counsel wish to ask the witness any questions about these papers as to date they may do so. I think counsel—well, the court will ask the question. Do you know what date Exhibit 8 was given to the defendant? I will show it to you so you won't be mistaken about it.

Mr. Gothberg: I believe that the date is on the original that Mr. Carr got—probably the carbon copy didn't cover it.

Court: What about Exhibit 9? Do you know the date or approximate date on which that was served upon the Defendant?

Mr. Gothberg: I really don't—but it was early in the spring when this was delivered.

Court: That is all right. You may return it to the Clerk. Counsel may proceed.

Q. Mr. Gothberg, I hand you another document and ask you whether or not you can identify it.

A. That is the bill for extra—for plumbing.

Q. Just state whether or not you can identify it.

A. I do, yes. [46]

Q. Now, what is it?

A. That is extra for plumbing and steel beam —and electric and glass—and bill for electric extra.

Q. Was that bill delivered to Mr. Carr?

A. It was.

Q. What date does the statement bear?

(Testimony of Victor F. Gothberg.)

A. 3-1-51.

Q. Was that after this particular work had been completed? A. It was, yes.

Q. There is some documents attached to that statement, Mr. Gothberg. Will you state what they are? A. Yes, one February 19, '51.

Q. From whom?

A. From Anchorage Installation—and on the second, there is no date on that.

Q. From whom——

A. But it is all from Anchorage Installation.

Q. What is the last document?

A. The last one is from Steel Fabricating Corporation—and is dated January 1st, 1950.

Q. When you presented that bill to Mr. Carr, to the best of your knowledge, did you attach also the copies of the invoices which you have there?

A. He got all the copies of invoices.

Mr. Bell: Your Honor, we object to it for the reason [47] that it is incompetent, irrelevant, immaterial, not properly identified—never having been given to Mr. Carr—or, if it was given to an architect, it was after the plaintiff stated that the architect had been discharged and was no longer connected with the work—and the date of it is March 1st, 1951, long after any work was done out there—and I object to it on all the grounds stated.

The Court: The objection is overruled. It may be admitted. The weight of it is for the jury. It may be read to the jury.

Clerk: Plaintiff's Exhibit 10.

(Testimony of Victor F. Gothberg.)

Court: It may be considered as read and may be read in whole or in part by either counsel at any time.

Mr. Arnell: Will you agree, Mr. Bell, just to read the first statement?

Mr. Bell: Yes, Ed.

Mr. Arnell then read the first page of Plaintiff's Exhibit 10 to the jury.

Q. Now, Mr. Gothberg, you have an item here designated as a steel beam. Is that the steel beam you described to the jury yesterday, which had to be installed? A. That is the one, yes.

Q. What did the items listed as extra on plumbing refer to?

A. They was ordered by Mr. Carr. They was changing of the drain for the wash rack—and there was also pipe for the wash rack that we was changing—and also for the hoist—for [48] a two-plunger instead of one. That was an extra on that—and what else there was I don't remember all of it.

Q. You have also here another item for a steel beam amounting to $142.56. Would you explain to the jury what that was?

A. The steel beam for holding up the roof for the main building.

Q. What did this item—glass—cover?

A. That was bigger glass in front than what it called for on the plan—one foot higher.

Q. Mr. Gothberg, I hand you another document and ask you to state whether or not you can identify it? A. I do.

(Testimony of Victor F. Gothberg.)

Q. Would you state what it is?

A. That is a bill for the total job.

Q. Did you give it to Mr. Carr? A. I did.

Q. What is the date of this statement?

A. 1-14-52.

Q. Had you given him a statement prior to that time?

A. I did—but it was based on percentage.

Q. Did you personally deliver this statement to Mr. Carr? A. I did.

Q. On or about the 14th of January of 1952?

A. Yes.

Mr. Bell: Object to this for the reason that it is outside [49] of the pleadings. It is not the statement sued upon and your Honor will remember that I filed a motion to make more definite and certain by furnishing us with an itemized statement in this case. It never was furnished and the record will disclose I did that—and asked for a Bill of Particulars on the account—and it come in at that time with what purports to be an account. It would be certainly unfair and it contains a lot of entries for interest items, and it would be misleading and detrimental.

Court: A Bill of Particulars is no longer permitted by the rules. The question of furnishing a definite statement is well within the discretion of the court and there are ample particulars for discovery by deposition. Therefore the objection is overruled. The statement is admitted. That does not

(Testimony of Victor F. Gothberg.)

indicate that it is correct—the witness states it is correct. The weight of it is for the jury.

Clerk: Plaintiff's Exhibit No. 11.

Mr. Arnell: There is one portion of this statement, your Honor, that I think we can agree can be disregarded. Mr. Bell, will you agree with me on that portion?

Mr. Bell: I raise no technical objection to that, but I understand the exhibit will go before the jury for examination at any time, and I believe that the exhibit should be read in detail if it is going in.

Court: The exhibit may be read. [50]

Mr. Arnell then read Plaintiff's Exhibit 11 to the jury.

Q. Now, Mr. Gothberg, under Item 3 of this statement, you have designated interior finishing, and you described that briefly yesterday. Will you state at whose request that was done?

A. At Mr. Carr's.

Q. And state generally, for the benefit of the jury, what it included?

A. All interior finishing.

Q. In the show room and sales department?

A. And partitions—and the show room and office.

Q. You have already testified to the other general items. Here you have listed a sign post and have made a charge of $67.50. Would you explain to the jury how that charge arose?

A. That sign post was ordered by Mr. Carr. He requested me to install it so I had the steel fabri-

(Testimony of Victor F. Gothberg.)

cator install that for me—and that is what he charged me for the job.

Q. Where is that sign post in relation to the building?

A. On top of the marquee—just about the center of the building.

Q. Is it attached to any of the steel beams on the marquee?

A. It is attached to the iron beam from the inside.

Q. Did that sign post have any relation to these charges you describe in relation to the beams on the marquee?

A. No, that is separate for the iron beam and separate for the [51] sign post.

Q. You have here an item of triple door to the show rooms. Will you explain to the jury what that is?

A. The three doors that go in between the show room and the shop—and they were also ordered by Mr. Carr.

Q. Was all the interior finishing done in accordance with his instructions, Mr. Gothberg?

A. Yes.

Q. Now, do you recall the approximate date when you finished the contract or finished the work under the contract on the extras?

A. The extras, I believe was—I believe was finished February 17th, I believe, or 23rd.

Q. Of what year? A. 1951.

Q. At what stage of completion was the build-

(Testimony of Victor F. Gothberg.)

ing, Mr. Gothberg, at the time that Mr. Carr moved in?

A. My work for the contract—it was completed at that time.

Q. When you state "completed," were there any minor work that had to be finished?

A. In front—there was quite a bit left in front to be done.

Q. Did you finish that work? A. Oh, yes.

Q. After he went in or——

A. Oh, yes. [52]

Q. At this time does there remain anything to be done to complete that contract in accordance with the specifications?

Mr. Bell: Object as incompetent, irrelevant and immaterial, and merely calling for a conclusion of the witness.

Court: Overruled. You may answer.

A. There is some small items to be done—and there is one plate glass that has to be replaced—and there is some kick plates on the door.

Q. Would you explain why the glass has to be replaced, Mr. Gothberg?

A. It was cut too small in the shop. It should be a quarter of an inch bigger.

Q. How much?

A. About a quarter of an inch bigger.

Q. Who cut the glass for you?

A. That was Alaska Glass and Paint.

Q. Are there any other items that you can think

(Testimony of Victor F. Gothberg.)

of that remain to be completed other than what you have mentioned?

A. A few pencil rods to cut off.

Q. Would you describe to the jury what that is?

A. Rods to hold the frames together when we are pouring concrete.

Q. Is there anything else?

A. No, I don't think I remember any more. [53]

Mr. Arnell: You may step down, Mr. Gothberg.

Court: The Court will stand in recess. Ladies and gentlemen, of the jury, during the recess you will remember the admonitions of the Court as to your duty, and the Court will stand in recess for 10 minutes.

The Court thereupon recessed at 11:02 o'clock a.m. until 11:12 o'clock a.m., at which time the following proceedings were had:

Court: Without objection the record will show all members of the jury present. Counsel for plaintiff may proceed with examination of the witness.

Mr. Arnell: We have concluded our examination, your Honor.

Court: Counsel for defendants may proceed with examination.

Cross Examination

Q. (By Mr. Bell): Mr. Gothberg, you had seen all of the plans and had initialed them in August? You had put your initials on the plans in August?

A. I had, yes.

Q. Then you had a full set of plans before you made the bid? A. I did have.

(Testimony of Victor F. Gothberg.)

Q. Now, did you examine Plan No. 1 before you started to work—that Plan No. 1 that you identified? [54] A. I did.

Q. Now, did you know that that plan had been complied with before you started work and that you were to cut off the concrete that had been put in by that plan? Did you so understand it?

A. This plan showed a change in that foundation.

Q. What I mean—you knew that that Plan No. 1 had been used by someone else and the foundation and walls had been put in before you bid, didn't you?

A. No, that plan had not been used by anybody else.

Q. It hadn't? A. No.

Q. And you want to tell the jury now that the foundation—that concrete work was not already in before you ever made a bid? A. It was.

Q. Oh, I thought it was.

A. Yes. This is a drawing of the old plan where the foundation was built before and this was made special for the alteration of that change in the foundation.

Q. You want to tell the jury that this particular plan here was made of work that was already done?

A. That's right.

Q. All right, now, did you remember seeing Plan No. 5 in here——

A. I saw them all. [55]

Q. Mr. Gothberg, you saw Plan No. 5 before you

(Testimony of Victor F. Gothberg.)

bid on that work, didn't you? Before you bid on the foundation? A. No.

Q. You never did see that?

A. No. This was after the bid was in.

Q. That's what you contracted to do for $2500 —and some dollars, wasn't it?

A. No, this is not included. That is the plan there. That's what I contracted to do for $2500.

Q. Mr. Gothberg, you would know your initials if you saw them, wouldn't you? A. Yes.

Q. Would you please look and see if you wrote that there in the corner? A. I did.

Q. Well, then, you did see them, didn't you?

A. Not at the time this was initialed. When I took the final contract—when the foundation was in—that was in September. That's when I initialed this.

Q. When did you have the set of plans the first time in your possession?

A. Oh, there was only one sheet I have to go by.

Q. Now, you admit that you went by that plan, don't you? A. I did.

Q. That one shows it out close to the street, doesn't it? [56]

A. No, that shows the change to move it back.

Q. Yes, and this is the change that you did, isn't it?

A. This was extra—where Mr. Carr made his change before—it says on the plan where the boiler was going to stand. It didn't show anything on that plan.

(Testimony of Victor F. Gothberg.)

Q. Didn't you testify yesterday that all of these plans were given to you at the time you made the bid and furnished to you by Mr. Carr?

A. Not complete—not on the foundation.

Q. When did you first see the plans on the building—any plans at all on the building?

A. I can't make an exact date for that.

Q. It was all together, wasn't it, except that one?

A. All this was together—and that was separate.

Q. That was a separate plan that had been discarded?

A. That was the only one I had for the foundation—and then, besides, I had a sketch because this wasn't drawn. I just got a sketch—and after that I got the plans.

Q. So when you told your attorney yesterday you did it literally in accordance with this plan —you didn't?

A. That is exactly the same thing.

Q. And you did initial this, didn't you?

A. At a later date. It was after the work was completed.

Mr. Bell: I offer this in evidence.

Court: Without objection, it may be admitted and marked [57] Defendant's Exhibit A.

Mr. Bell: This is the one that's initialed by him.

Court: All right. Defendant's Exhibit A.

Q. Now, Mr. Gothberg, you never served any statements on Mr. Carr other than those statements you have described here yesterday?

(Testimony of Victor F. Gothberg.)

A. What kind of statements?

Q. Well, did you ever give him any itemized statement other than those?

A. For what purpose—for collecting bills, or for what?

Q. I don't know. Did you give him other statements other than those that you say you gave him?

A. He got statements every month—and most of the time I asked him personally. He said he didn't have it so I didn't make out any statement then.

Q. He told you he didn't have the money?

A. That's right.

Q. You stated that you went with him to the First National Bank a time or two about this matter? A. I did.

Q. You knew that money had been borrowed at the bank before you started, didn't you?

A. No, but I was promised by Mr. Cuddy. He promised that it would be paid.

Q. That it was there in the bank? Didn't he promise you that [58] the loan had already been approved? A. No.

Q. Did you ever ask Mr. Cuddy for any money on this bill? A. I did.

Q. How come you had to ask Mr. Cuddy for the money if you didn't know it was there?

A. The money wasn't there—so I didn't get it from Mr. Cuddy.

Q. But you knew it was supposed to be there, didn't you?

A. Yes, it was supposed to be there.

(Testimony of Victor F. Gothberg.)

Q. Did Mr. Cuddy tell you that you had not complied with your contract and come on back and do the work on that building and you would get your money? A. No.

Q. You know Mr. Cuddy is dead, don't you?

A. I know. If he wouldn't I would have the money right now.

Q. He didn't die until long after the building was finished, did he? A. No.

Q. The first statement you ever sent him for this foundation was $4,000 and some dollars, wasn't it? A. That's right.

Q. You never sent him any other statement or never made any other charges?

A. There was a bill before that—a little less amount.

Q. Why did you send him a bill for a lesser amount? [59]

A. Because there was more work to be done after the job wasn't completed.

Q. Didn't you testify yesterday, that the foundation work was fully completed before you signed the contract to build the building?

A. Yes, but there was some in front there to knock out the wall down—that wasn't completed.

Q. When did you complete the foundation?

A. I believe it was in July.

Q. Then when did you finish it?

A. After the foundation itself—it was about a month.

Q. And you made the contract in June, didn't

(Testimony of Victor F. Gothberg.)

you? A. Something like that.

Q. Then you had it all done, then, sometime in July?

A. Yes, except in front—for knocking down the concrete.

Q. I hand you a statement and ask you to state if you didn't prepare that? A. I did.

Q. And why did you charge a different amount there?

A. Because it wasn't finished in front—to knock the whole wall down—it wasn't finished—so I had to do that work after.

Q. Do you notice the date on that statement?

A. 10-20-50.

Q. That would be October 20th, 1950. Did you date that yourself? [60]

A. No, I had a girl write that out.

Q. Did you give that to Mr. Carr?

A. I did.

Mr. Bell: We offer it in evidence.

Mr. Arnell: No objection.

Court: It may be admitted and may be read to the jury.

Clerk: Defense Exhibit B.

Mr. Bell then read Defendant's Exhibit B to the jury.

Q. You had forgotten about giving him that statement, hadn't you, Mr. Carr?

A. No, I didn't.

Q. Why did you give him one for an altogether different sum and charged more later?

(Testimony of Victor F. Gothberg.)

A. Because I had to lower the grades—so I had to knock over more concrete.

Q. You gave him that when the building was going up, didn't you? A. I did, yes.

Q. And the foundation, you just testified, was in in July, didn't you? A. That's right.

Q. Now, you made a contract with him to do certain work for $38,450.00, didn't you?

A. That's right. [61]

Mr. Bell: May I have that exhibit—it is either 1 or 2, I believe it is 2—September the 19th?

Q. Mr. Gothberg, I am giving you Exhibit No. 2 for the Plaintiff and I will ask you to look that over and see if you find these words right on the face of the contract: "Article I—Scope of the Work —The contractor shall furnish all of the materials and perform all of the work shown on the drawing and described in the specification entitled Construction of a Nash Garage." Did you know that was there when you signed it?

A. I knew it was there.

Q. Did you know it was there when you attempted to give him bills for hundreds of dollars for extras?

A. That statement is in the specifications—what I was supposed to furnish and what Mr. Carr was supposed to furnish.

Q. You knew what was on the ground before you started, didn't you? A. Oh, yes.

Q. You checked it carefully? A. I did.

Q. Now, then, did you know what became of

(Testimony of Victor F. Gothberg.)

the beam that had to be replaced down there—the steel beam? Do you know what became of the original there? A. No, I don't.

Q. Well, when you checked the plans and specifications, you [62] checked all the steel and everything carefully, didn't you? A. No.

Q. Why didn't you?

A. Why should I?

Q. Well, you were going to furnish everything that wasn't there.

A. Mr. Carr was supposed to furnish that.

Q. Well, the contract that you signed says differently, doesn't it?

A. The contract is according to specification.

Q. And the specifications had the beam in it, don't they?

A. In the specifications it calls for Mr. Carr should furnish all structural steel—Page 1.

Q. The plans that you had yesterday shows that particular beam in the plans, doesn't it?

A. It does. It shows how to erect it.

Q. And it shows both those steel beams that you had attempted to charge him for?

A. The specifications called for Mr. Carr to furnish that.

Q. Show me something in the specifications where he was to furnish anything except what he had.

A. May I have the specifications? There is a special condition—footing and a foundation—as well as boiler room walls are in place. [63]

(Testimony of Victor F. Gothberg.)

Q. Where are you reading from—what page?

A. That is A—and B is that filling of existing concrete is complete. C—structural steel is on site, but is not in place and consists of so many pounds —it don't state.

Q. So he didn't represent anything to you about how many pounds of steel was there—you checked that yourself? A. No.

Q. I see. Now, do you know whether or not this beam was there when you made the bid or not?

A. I don't know if it was there or not—as long as it states here I take it for granted that all the steel was there.

Q. Now, who was to preserve the equipment? Who agreed to preserve all of the equipment and take care of it during the construction of this work —did you do that? A. What equipment?

Q. Everything that was on the ground. Did you contract by the specifications to take care of this stuff and see to it? A. No.

Mr. Arnell: If your Honor please—I can't hear and listen to this—to Mr. Bell's question. They are argumentative and I think he can phrase them so the witness can answer them. The specifications are in evidence——

Court: If there is part of the specifications that puts the burden on the contractor to look after the property, it [64] should be brought to the attention of the jury. They will have to decide the case finally.

Mr. Arnell: I realize that, your Honor, but the

(Testimony of Victor F. Gothberg.)

method of Mr. Bell's phraseology is strictly argumentative. He makes a statement and asks the witness if he didn't do it and didn't agree to do so and so forth.

Court: The objection is sustained to the extent that counsel should invite the attention of the witness to some phrase that would bear upon this issue, if there are any.

Q. Now, Mr. Gothberg, referring to the special conditions—it is the second page, I believe. I will ask you if—about the middle of the page—if you read the same as I do: "SC-2, Items Furnished Without Cost to Contractor But to Be Installed by Him: A. Car Washing Rack, Model..... by ....., 2 gasoline pumps, Model..... by ....., and 2 gasoline storage tanks, 1500 gallons capacity, to be piped and buried beneath gasing apron. Air compressor of ..... capacity to be placed in boiler room and connected to outlets at fuel pumps and to two outlets in vicinity of grease racks. E. One rotary car lift is to be installed and provisions made for the future installation of a second." Do you read with me there? A. I do.

Q. Then you agreed to do that, didn't you?

A. I did. [65]

Q. Now, I will ask you—a little further down—SC-3, if you see these words: "Surveys and Grades. The contractor will make his own surveys and establish his own grades. SC-4. Responsibility Regarding Existing Utilities and Structures. The contractor shall be held responsible for any damage

(Testimony of Victor F. Gothberg.)

to, and for maintenance of existing utilities and structures." Do you see that? A. I see it.

Q. That was in there when you signed it?

A. It was.

Q. So if that beam was taken away from there, either you took it or you were responsible——

Mr. Arnell: I wish to renew my objection.

Court: Objection sustained.

Q. If the beam was there do you know what happened to it?

Mr. Arnell: Objection.

Court: The last question is in order.

A. No.

Q. Mr. Gothberg, you did not work nights there, did you? A. I did not.

Q. Did you have any watchmen on the job?

A. No, I didn't.

Mr. Arnell: If your Honor please, I wish to renew my objection—so far as the issues of this case are concerned, there is no showing that any steel beam was lost or stolen or [66] any equipment was lost or damaged or not taken care of.

Court: Overruled as to this question.

Q. Did you ever see the engineer there on the job in the daytime? A. Oh, yes.

Q. How many times did you ever see him there?

A. That I couldn't state—but it was quite a few times.

Q. Well, was it one, two, three times? How many times approximately?

(Testimony of Victor F. Gothberg.)

A. He came out there about two or three times a day anyway.

Q. Were you over there when he was there and Mr. Carr was there at the same time?

A. I believe only one or two times.

Q. Was that before the work started—or after?

A. That was after.

Q. And you are sure now—you tell the jury you are sure that you saw the engineer there at the same time Mr. Carr was there? A. I did.

Q. And were they together?

A. We met there—I don't remember for what purpose but I know for sure we met one time there—and we was all three there.

Q. Now in the specifications they describe all the plans that had any effect on any work you did there, did they? A. That's right. [67]

Q. You are sure of that? Do you have the specifications there? A. Yes.

Q. Would you turn to what would be the 4th page and tell the jury if Plan No. BCG 1 is ever mentioned? A. It is not.

Q. That is the plan you had here before the jury yesterday?

A. That is one I built the foundation by.

Q. Where did you get that plan?

A. From Mr. Anderson.

Q. Did you get that recently or had you ever seen it until recently?

A. That was on the job when I built it. That is the one I used when I built it.

(Testimony of Victor F. Gothberg.)

Q. Do you know why it was not mentioned in the specifications at all.

A. Because that work was done already—this specification just covered the main building after that work was done.

Q. And the specifications you have there covers the particular boiler room and the stairway, doesn't it? A. In this, yes.

Q. Well, doesn't those plans that you used when you bid cover that particular thing?

A. For the main building I used this specification, yes.

Q. Why do you claim you are entitled to extras then when the [68] contract provides that you will do that work under the terms of the contract?

A. Turn to Page 1—it states right there—fittings and foundations, as well as boiler room walls, are in place—which proved that it was built by that plan and not by this.

Q. And they were already done before you ever bid on the other building? A. Right.

Q. And then in the building plans you say you never did see No. 5 G until you bid on the building—is that right—or just before?

A. I only had a sketch on that, yes.

Q. Doesn't 5 BCG there show the elevations—I will ask you to see if that doesn't show that particular work, the stairway and the other things—I will ask you, Mr. Gothberg, if that stairs coming down from above—doesn't that show the boiler room, the walls and everything right in there?

(Testimony of Victor F. Gothberg.)

A. It does.

Q. That's what you did for your work, wasn't it?

A. That's for the extra there, yes.

Q. You agreed to do that for twenty-five hundred and some odd dollars, didn't you, in writing?

A. That contract only covers for moving of walls back.

Q. Is this your signature on this contract?

A. That's right. [69]

Q. And didn't you agree to do that for $2,542.00 in writing? A. I did.

Mr. Arnell: If your Honor please, object to further questions along this line. It is repetition in the first place and it is argumentative in the second place. The witness testified three or four times about this phase of the case.

Court: Overruled. You may answer.

Q. That was dated 5-24-50? May 24th, 1950?

A. Yes, and this plan was made and came out 7-5-50.

Q. This print here was made 7-5-50?

A. Yes.

Q. And this contract was taken months before that print was made? A. Yes.

Q. Yet you say you did that all before you ever bid on the other contract? A. That's right.

Q. Didn't you have those plans before you all the time now—or a set of them?

A. I said I had a sketch—which is just exact duplicate of this—but I didn't have a regular plan at the time.

(Testimony of Victor F. Gothberg.)

Q. Didn't the engineer furnish it first in a sketch and then the blueprints were printed from the sketch? Isn't that right?

A. That's right. [70]

Q. And they are dated as they are printed?

A. Yes.

Q. Now, this letter—let me see that letter from the engineer, please, I believe it was introduced this morning, but I can't remember the number.

Clerk: Seven.

Q. This letter, Plaintiff's Exhibit 7, that is signed by Lorn E. Anderson and it is dated December 28, 1950. You stated that he gave it to you later. Now how much later?

A. Oh, most of the work was completed already. He gave me an order that as the work progressed —to do so and so—many changes.

Q. And all of the work he authorized in that letter you had already completed?

A. Most of it, yes.

Q. Did you ever make a bid or give an estimate to Mr. Carr or to him as to how much it would cost to do that extra work?

A. I did not. I said that the only condition I would take is time and materials.

Q. You did respect the contract you had with Mr. Carr, didn't you? A. That's right.

Q. Do you remember whether or not that contract provides that if there are any changes you will submit estimates of costs [71] to be approved or rejected before the work is done?

(Testimony of Victor F. Gothberg.)

A. I talked to Mr. Carr about that—and he said it isn't necessary—we will let it go as time and materials, so there never was done any such thing.

Q. So you abandoned the contract and did the work time and material?

A. On the extra, yes. The changing on the contract was never changed.

Q. Did you see this man, Anderson, when you got that letter from him? A. Oh, yes.

Q. Where was he when he wrote that letter?

A. Out in the district, I guess.

Q. Out on the base, was he? A. Yes.

Q. Did you go out there to see him?

A. No, he came to the job and give it to me right on the job.

Q. How come you know that he wrote it out on the base?

A. Because he was working there. I don't know whether he wrote it there or not.

Q. You are willing to testify he wrote it out on the base and you don't know?

Court: What difference does it make whether he wrote it out on the base, or in town, or on Cook Inlet?

Q. Do you know where he was when he wrote the letter? [72] A. I don't.

Q. Were you with him? A. No.

Q. Do you know the approximate date that he wrote the letter?

A. It states here the 28th of December.

(Testimony of Victor F. Gothberg.)

Q. Yes, but you told your attorney that it was delivered to you later at some other time.

A. No—I said it was delivered to me after the work was done because I asked him special to get that in writing—and so I did.

Q. Did you ask him for that letter after the controversy came up between you and Mr. Carr about this work there?

A. We talked it over before—and all those extras were supposed to be work under the condition of time and material.

Q. The engineer talked to you about it, did he?

A. Oh, yes.

Q. Was Mr. Carr ever present when any of those conversations took place?

A. I believe he was and if he wasn't—because I took orders from Anderson.

Q. You didn't take any orders from Mr. Carr? You took them from Mr. Anderson?

A. Yes, but all the time he was there.

Q. How long was he there?

A. Around Christmas time—or New Year's. I know he was there [73] after New Year's—I don't remember the date.

Q. You never did make an estimate then as to these extras and submit it to Mr. Carr or to the engineer? A. I never did.

Q. All right now—on this 8 by 8 door in the south wall—was the wall laid up at the time the 8 by 8 door was decided upon?

A. It was not.

(Testimony of Victor F. Gothberg.)

Q. And then the door was added before you laid the south wall? A. That's right.

Q. Now, did you ever submit an estimate to Mr. Carr or to the engineer as to what that 8 by 8 door would cost installed? A. No, I never did.

Q. Now, you refer to changing the fuel pumps. Did you set the fuel pumps yourself? A. No.

Q. Did you ever set any of the fuel pumps?

A. No.

Q. Then you didn't change the pumps at all, did you? A. No.

Q. Well, now, then this hoist that you have referred to—it was originally a one-plunger hoist that was supposed to have been installed?

A. Right.

Q. Did you see that hoist before you started working there? [74] A. No.

Q. You didn't see it? A. No.

Q. Now, that hoist was here a long time before it was used, wasn't it?

A. No—not that I know of—he was supposed to deliver it to the job and he delivered it—I believe it was the 29th of December.

Q. Are you sure it was the 29th of December?

A. I wouldn't be more than two days off.

Q. Now, why didn't you put in preparations for the second hoist, as provided in the specifications there? A. That's done—that there.

Q. What is done in the way of preparation for the second hoist? A. The pipes.

Q. What pipes? A. For all.

(Testimony of Victor F. Gothberg.)

Q. Is it for a one-plunger hoist, or for a two?

A. That's for a two.

Q. When did you put those in?

A. The same time as I put in for the other one.

Q. Is the openings for the setting of this hoist there now?

A. It is provided for opening the frame—it is providing for the opening. [75]

Q. But you poured the frame? A. Right.

Q. There is no holes in it? A. No.

Q. No place where he could find any connections or anything for this second hoist, is there?

A. That couldn't be done because they didn't have the hoist there.

Q. Why did you contract to do it?

A. That's provided for—the second one—but the frame had to be poured.

Q. And you didn't leave any openings in the frame for the second hoist?

A. There is poured one slab—like this—where the hoist is supposed to be installed—and that got to be knocked out if he ever got another hoist.

Q. Then the bill that you charged him for the overhead door—you took the blocks out—the concrete or cinder blocks away, did you not?

A. I did, yes.

Q. You took the blocks away? A. Yes.

Q. Did you use them somewhere else, Mr. Gothberg? A. No, I still got them.

Q. Then you took the blocks out of the 8 by 8 hole and put the [76] door in the inside?

(Testimony of Victor F. Gothberg.)

A. I did, yes.

Q. You kept the blocks? A. I did.

Q. Now, the hoist that was put in there has just two plungers instead of one, as was originally planned? A. That's right.

Q. Does the air go from the compressor to one separate—— A. Separate to each plunger.

Q. Does that connection go directly to and connect up with the compressor?

A. That's right.

Q. And that's the way you fixed his down there, is it? A. Right.

Q. Were you there when it was put in?

A. No, I don't think I was. Anchorage Installation did that work for the piping.

Q. And you don't know then—and you are charging him for the Anchorage Installation bills in there, aren't you?

A. I am, yes. No—no—it is a percentage, I believe, that was charged—40% on that bill.

Court: We will suspend until 2:00 o'clock this afternoon. You may step down. Ladies and gentlemen of the jury, during the recess you will remember the admonitions of the Court as to duty and you may now retire. The Court will remain in session. [77] Return at 2:00 o'clock.

Whereupon at 12:01 o'clock p.m., the trial of the above entitled cause was continued until 2:00 o'clock p.m.

Be It Further Remembered, that at 2:00 o'clock p.m., the trial by jury of the above entitled cause

(Testimony of Victor F. Gothberg.)

was continued, the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: Counsel for defendant may proceed with examination of the witness.

Q. Mr. Gothberg, would you look at this map here—this plat—and see if that is your initials on there? A. That is right.

Q. Did you put it there? A. I did.

Q. Was that in your possession when you made the bid? A. Oh, yes.

Q. And you then made the contract knowing exactly about this? A. Oh, yes, I knew.

Q. And, Mr. Gothberg, what does this drawing right through here represent?

A. That is the walls.

Q. Is that a wall? [78]

A. That is right.

Court: The jury can't see what counsel is pointing at. If it is very important I would suggest you staple it to the board. Counsel can do as he pleases.

Mr. Bell: Yes, your Honor, I think we should do that.

Q. Mr. Gothberg, would you come down so the jury can see. Now, did one of those beams go through here? A. No.

Q. Where did the beams go?

(Testimony of Victor F. Gothberg.)

A. Here's the beam.

Q. This is the beam? A. Yes.

Q. That is the beam that you charged him $500 for? A. That's right.

Q. Where is the beam that you charged him the other?

A. It don't show on the plan. That's on top of this end here to carry the end of the joists.

Q. Mr. Gothberg, didn't you just misunderstand the drawing—isn't that a beam right there?

A. No, this is the wall.

Q. But you put the beam in all right?

A. Oh, yes.

Q. You learned from the plan that the beam had to be in there, did you? A. No. [79]

Q. How did you learn that the beam had to be in there?

A. It was no plan drawn for that beam that holds the roof.

Q. Mr. Gothberg, all of this drawing was there at the First National Bank, and you and Mr. Cuddy and Mr. Burton E. Carr all went over these together, didn't you?

A. We did, yes—in Mr. Cuddy's office.

Q. That is the senior Mr. Cuddy? A. Yes.

Q. And there hasn't been any change in the plans—these papers—in any way, has there?

A. No.

Q. So you initialed this so that you could identify it? Where is your initials?

A. Right here.

(Testimony of Victor F. Gothberg.)

Q. And you put that on yourself?

A. I did, yes.

Q. What is that drawing right there?

A. The end of the iron beam.

Q. The end of the iron beam?

A. Yes.

Q. What is this fastened here?

A. This is fastened there.

Q. Fastened the beam to what?

A. To this beam. This beam was in before this was put in.

Q. This is the iron beam that went through here?

A. That's right.

Q. What is that beam?

A. That is the connection in at this end.

Q. What is this from here? What is this beam?

A. That's a wall here.

Q. And what is this, Mr. Gothberg?

A. That is one end on the beam.

Q. On this beam right here?

A. I believe that is.

Court: Pardon me, Mr. Bell, is that drawing in evidence?

Mr. Bell: Oh, I offer it in evidence.

Court: Is there objection?

Mr. Arnell: I see no reason to admit it, your Honor. It is identical with the one that is in except it doesn't bear Mr. Gothberg's initials. It is a duplication in the record of the exhibit.

Court: This one seems to me to be a bit clearer.

Mr. Arnell: I have no objection.

(Testimony of Victor F. Gothberg.)

Court: It may go in and if it seems there is an unnecessary duplication, one of them may be withdrawn. As long as the witness has testified to it I think it ought to be in evidence.

Q. Mr. Gothberg, when you were putting in the lift, did you have a set of plans and specifications that was furnished by the factory with the lift?

A. I had, yes. [81]

Q. Now, did you first have one and lose it, or allow—or it did get misplaced somewhere and Mr. Carr had to send and get another one outside?

A. No, I only had one.

Q. Wasn't there one sent for when you were about ready to install the lift? Didn't they have to get one by wire to Seattle?

A. Not that I know of because there was a plan with the hoist when it came.

Q. Now, do you know what kind of a hoist you put in? A. A two-plunger hoist.

Q. Do you know the name of it?

A. No, I don't remember the name.

Q. To refresh your memory, was it rotary?

A. No.

Q. It wasn't? A. No.

Q. I hand you a paper that has not yet been marked and ask you to state if you know what that is? A. That is a hoist.

Q. And is that the same hoist you put in there?

A. Probably not the same but it is similar to it. It was a two-plunger.

(Testimony of Victor F. Gothberg.)

Q. Look at it carefully and see if it's not exactly the one that you put in? [82]

A. I couldn't say. It was probably different but as far as installment, it would be exactly the same.

Q. Now that is called rotary right on the top of it, isn't it—rotary hoist? A. It does, yes.

Q. That is the one you installed?

A. That is right.

Q. And that is the one you contracted to install?

A. No, this is not the one.

Q. Well, now, look there—look at the rotary hoist and see if you can see any rotary hoist with one plunger. See if they don't all have two plungers.

A. There might be in this company—maybe they have it—but another company might have a one-plunger.

Mr. Bell: We offer this in evidence.

Mr. Arnell: May I ask a question, your Honor?

Court: Yes.

Redirect Examination

Q. (By Mr. Arnell): Do you know, Mr. Gothberg, whether this type of a hoist was actually installed?

A. That is the type that was installed, yes.

Q. But it is not the type that was supposed to be installed—in other words, a two-plunger hoist. Is that correct?

A. That is the one that is installed, yes—two-plunger, yes. [83]

Q. Now, at the time discussion was had regard-

(Testimony of Victor F. Gothberg.)

ing the type of hoist was there a discussion with reference to a two-plunger or only a one plunger hoist?

A. There was supposed to be one-plunger.

Q. And at the time that these discussions took place, did you understand that you were to install a rotary hoist or a hoist by the trade-name of rotary, or just a single-plunger hoist?

A. When I signed the contract, the understanding was that there was supposed to be only one plunger.

Mr. Arnell: We object to it, your Honor, upon the grounds that there has been no foundation laid for it.

Court: Objection is sustained at this time.

Mr. Bell: At this time, would you produce me the original demand for further compliance with the contract that was served on you?

Mr. Arnell: Here it is. You might not recognize it. I made a lot of notes.

Mr. Bell: If it's just pencil notes we can erase them, or if you won't object, I will use my copy. Would you like to compare it. I haven't got pencil notes on mine except I got a little note on on the day of service.

Mr. Arnell: Which one of these notices are you planning to use—you served two.

Mr. Bell: Only served one. [84]

Mr. Arnell: The one attached to the complaint is different than this one.

(Testimony of Victor F. Gothberg.)

Mr. Bell: It must be just a typographical error —I didn't mean it.

Recross Examination

Q. (By Mr. Bell): Mr. Gothberg, I hand you a notice of demand to meet the terms of contract. I will ask you to check down through that and state whether or not that was served on you by registered mail.

A. That was. I got one like that.

Q. You got it? A. Yes.

Mr. Bell: I offer it in evidence, your Honor.

Mr. Arnell: I think this is out of order, your Honor. This relates to the plaintiff's cross complaint and I would raise an objection upon that ground. It is beyond the scope of direct examination. It would be part of Mr. Carr's case. It is part of the cross complaint and I think this is improper at this time.

Court: What has counsel for defendant to say to that?

Mr. Bell: I don't think, your Honor, that it would be improper because he has testified to strict compliance with the exception of two or three things, and I want to examine him about this particular notice that was served on him by [85] registered mail and to have him called back after it is introduced in evidence would be a rather cumbersome way of doing it.

Court: Doesn't counsel think the way to approach it is to examine him on these various items

(Testimony of Victor F. Gothberg.)
as to whether or not certain things were not done that he had contracted to do?

Mr. Bell: That's what I want to do, your Honor.

Court: Cannot that be done without offering the written demand in evidence?

Mr. Bell: I would be glad to do it but I thought Mr. Arnell would immediately demand that I introduce it if I was going to ask the questions.

Court: In order to shorten——

Mr. Arnell: My only objection to it, your Honor, is that it contains other requests than those which might be included within the terms of the original contract. This is quite a voluminous notice and I think contains some thirty-five different items, not all of which have been testified to by this witness on his direct examination.

Court: The fact that not every item has been mentioned would not preclude its being introduced. I think in order to shorten the trial, although out of order, it may be admitted. Ladies and gentlemen of the jury, you understand this is a demand made by the defendant, Mr. Carr, upon the plaintiff in the action. Papers of this kind are sometimes considered as what is known in law as self-serving declarations. In other [86] words, if one man makes an unjust claim upon another, he can sit right down and write it all out and put it before the jury and say I demanded so and so and it might not be true. It is for you, of course, to determine whether this demand has any foundation or what the foundation is. Ordinarily it would not be ad-

(Testimony of Victor F. Gothberg.)

mitted at this time, but since there is a cross complaint I think possibly we would take it up now with a saving of time.

M. Arnell: May I make one request of the court then?

Court: Yes.

Mr. Arnell: That it be limited strictly to the items about which Mr. Gothberg has testified. There were a number of items, your Honor, that are strictly without any possibility of argument—matters that relate to the cross complaint and have to be brought out by Mr. Carr. As to the items about which Mr. Gothberg has testified, I have no objection to the court's ruling, but I think it would be going far afield now in this cross examination to bring in these various items relating to claimed damages for one reason or another.

Mr. Bell: I am introducing it to offset his statement that he had literally complied with the contract outside of two or three exceptions which he described.

Mr. Arnell: Apparently I haven't gotten my point across. There were three or four items that relate to damage resulting from breach of contact, or whatever else might be charged, and I think at this state those items have no materiality in [87] cross examination.

Court: We can take them up when we come to them then. The jury will understand this is a claim made by the defendant. It may be admitted and marked Defendant's Exhibit D and it may be con-

(Testimony of Victor F. Gothberg.)

sidered read or may be read. Without objection it may be considered as read and either counsel can refer to it at any time.

Recross Examination

Q. (By Mr. Bell): Mr. Gothberg, do you remember the date you received the original of which this is a copy through the mail?

A. In the spring sometime.

Q. About May 15th?

A. I couldn't state the date of it—but it was in the springtime.

Q. Was it in the month of May?

A. I wouldn't be sure about that.

Court: What year?

Mr. Gothberg: 1952.

Q. Now, Mr. Gothberg, after you received this, what did you do with it? What did you do with the original of this?

A. It's just out home. I didn't do anything with it—I just read it.

Q. Did you ever talk to Mr. Carr about it?

A. No, I didn't. [88]

Q. Did you ever talk to anybody about doing the things that he demanded done to comply with the contract? A. No.

Q. We will take them down the line. Did you or did you not contract to provide and furnish a bond guaranteeing the compliance with the terms of the contract? A. I did.

Q. Did you ever furnish it? A. No.

(Testimony of Victor F. Gothberg.)

Q. Now, did you contract and agree to hook up the lights on the 7600 pump?

A. I believe that was in the contract, yes.

Q. Did you ever do that?

A. I never did it but see—the electric had a contract for that—if they did it or not, I wouldn't know for sure.

Q. After you received this notice, did you go and see whether they did or not? A. No.

Q. So far as you know, then, it never was done?

A. So far as I know, I believe it was done—and a long time before—because they said they was through with the job and he never had any complaints—and the year after I got this letter—he never complained that it wasn't hooked up.

Q. You knew they were complaining when you got this notice, didn't you? [89]

A. Oh, yes, but that is a year after the job is finished. It can happen that there be some damage in this time because I believe it was working at the time the contract was finished.

Q. Then in the contract, were you required to install one globe and window light on the marquee?

A. I believe so, yes.

Q. Did you ever do it?

A. I never did it—it was the electric.

Q. Well, the electric people worked for you as a general contractor, didn't they?

A. That's right.

Q. It was your duty, under the contract, to see that the terms were met, wasn't it?

(Testimony of Victor F. Gothberg.)

A. That's right.

Q. Now what did you do about this—he states this: "You have failed to install a front window glass that is large enough to comply with the terms of the contract and the glass that you have placed in this opening is too small, and is subject to being broken by reason thereof, and presents an unsightly appearance. Please take this window out and install a proper glass, and put in the nickel plating on the outside and inside of the windows, and install window strips on inside." Now, what did you do about that? [90]

A. I called the Alaska Glazing. They had a contract for all the glazing.

Q. Did you go down there to see what the condition of it was?

A. I did. I admit that—I will replace that.

Q. You never did do it—and this has been served on you months and months ago?

A. I made a statement to Mr. Carr that I will not do any more work on that building before I receive payment of $15,000. That's why I didn't do it.

Q. And his answer was he didn't think he owed you anything—that you owed him—is that right?

A. The way it looked—but I got it in black and white.

Q. I will ask you what you did about this, Mr. Gothberg, Number 5: Install a proper shut-off valve below the concrete to prevent freezing on outside hydrant. Did you ever do that?

(Testimony of Victor F. Gothberg.)

A. No. For the same reason.

Q. But the contract provided for it, didn't it? And the specifications?

A. Yes, but for the same reason it wasn't done.

Q. Was there a pipe that came up there in some kind of a manner?

A. I am not sure if it came through the wall when it come up outside the ground.

Q. There was no proper cut-off so that the water could be [91] taken away?

A. Yes. I would like you to wait and ask about all the plumbing—also the electric—because they will be down here and they can answer more accurate about those questions.

Q. Well, you knew it should be done, didn't you?

A. I knew it.

Q. Did you ever look at that pipe that was put in there? A. Yes, many times.

Q. Would you say it was put in right?

A. That I really can't say.

Q. You couldn't say? A. No.

Q. Now, it didn't have any shut-off on it under the ground, did it?

A. That's what he claims.

Q. It is true, isn't it? A. I believe so.

Q. Thank you, Mr. Gothberg. Now, do you know whether it bursted or not and water was——

A. That I don't know. I never had any complaint about that pipe until this spring—almost a year and a half—and if there was trouble with that

(Testimony of Victor F. Gothberg.)

he should have notified me right off and it would have been fixed.

Q. You didn't fix any of these other things they notified you [92] about? A. Not now.

Q. Did the contract provide—and the specifications—to install and furnish outlet plates on electrical contacts?

A. That's right—and the reason they wasn't installed—the City Electrical—I called them up and there was a man down there two times to install them—and Mr. Carr said "leave them off and I will put them on myself because I'm going to get the wall painted."

Court: Did you hear that statement made yourself? Did you hear the conversation?

Mr. Gothberg: No, but he told me to, your Honor?

Court: Who do you mean by "he"?

Mr. Gothberg: Mr. Carr.

Mr. Bell: Well, I move to strike what the electrical boys told him.

Court: Motion is denied.

Q. Mr. Carr told you to leave them off?

A. That's right.

Q. When did he tell you that?

A. It was two or three days before the job was completed.

Q. Well, that would be in February or March?

A. In February.

Q. And was there anybody present when he told you that? A. That I don't remember. [93]

(Testimony of Victor F. Gothberg.)

Q. Well, then your contract did call for solid brass cylinder locks in the front doors, didn't it?

A. That's right.

Q. And you didn't furnish them, did you?

A. I did.

Q. You furnished them?

A. I put in cylinder locks in there.

Q. Yes, but Mr. Carr had to go out to town and get them to get you to put them in after you had put in some other kinds of locks in, didn't he?

A. He wanted another kind—so it was up to him to get them and I would install them.

Q. Did you tell him you couldn't get solid brass locks?

A. No, I put in brass locks in there.

Q. A little light cylinder lock?

A. No, they are my regular—for outside doors.

Q. And then you charged him for the carpenter that changed them, didn't you? Their time was figured in this extra that you figured, wasn't it?

A. No.

Q. Who put the lock in, actually?

A. The carpenter.

Q. What carpenter?

A. I don't remember now. That I wouldn't remember anyway. One of my men put in that work for me. [94]

Q. Some carpenter put it in? Now these carpenters you had there—you charged Mr. Carr per hour for those people, didn't you?

A. I did, yes.

(Testimony of Victor F. Gothberg.)

Q. Now, Mr. Carr had to pay $45.00 for those locks, did he not? A. That I don't know.

Q. You never did pay him back for the locks, did you? A. Certainly not.

Q. And you never allowed him credit for furnishing the locks? A. No, I didn't.

Q. But your plans and specifications did provide that you would furnish everything?

A. I did. I had locks in there and he wanted another kind.

Q. Well, he wanted front door locks, did he?

A. Those was front door locks I had in there.

Q. Now, did you install push plates and kick plates on the five doors? Did you install all that?

A. I don't think they called for five doors—and I promised I would install those when I get the payment.

Q. You refused to do it until you are paid—is that right?

A. Not full—but some partial payment.

Q. Now, you didn't put them on then, as I understand it? A. Right.

Q. And you did contract to put them on five doors, didn't you? [95] Your contract provides to install push plates and kick plates on five doors?

A. I don't remember how many doors there was—but there was some doors.

Q. Did you ever put a two-way swinging door between the show room and the shop?

A. That's extra—that is not in the contract.

Q. Well, doesn't the contract provide for a two-

(Testimony of Victor F. Gothberg.)

way swinging door between the—doesn't the specifications describe that?

A. It does—but it also makes a statement that it is not in the main contract.

Q. But the specifications there provide for it, doesn't it? A. It does, yes.

Q. And you didn't install a two-way swinging door at all, did you?

A. No. I did but on his account because it didn't belong to my contract.

Court: May I ask him a question? Why isn't it in your contract if it is in the specifications?

Mr. Gothberg: It states in the specifications, I believe, on page 1.

Court: Go ahead.

Q. I will ask you to show us those in just a little bit, Mr. Gothberg. Now, on that two-way swinging door—it was [96] supposed to have push plates and kick plates on it, too, was it not?

A. That I don't know.

Q. You don't remember?

A. No, and if it should be—then it would be extra.

Q. Even though the specifications called for it, you think you are entitled to extra?

A. I don't think there was kick plates on those doors.

Q. Now, did you have any trouble with the heating unit out there at the place?

A. Not that I know of.

Q. Did you ever install the heating units?

(Testimony of Victor F. Gothberg.)

A. Anchorage Installation installed those.

Q. Do you know whether they put the motor in one at all or not?

A. I believe there was one stolen—but he delivered another one over there.

Q. Didn't you, after you received this request from Mr. Carr to do these things—didn't you go out and see whether that heater would work or not?

A. No, I didn't—because in the first place he did not request me to go out there and do that work.

Q. I will ask you if Number 11 in this written notice does not request you: "You have neglected to finish installing one heating unit with motor."

A. Right.

Q. Why didn't you do it then?

A. At that time I believe there was a change there so he couldn't install it—so that was the agreement between him and Anchorage Installation——

Q. Now, you weren't there at the time?

A. Oh yes, I was there at the time.

Q. You heard the conversation? A. No.

Q. Well, then don't tell about it.

A. I heard some of it.

Q. Just tell what you heard when Mr. Carr was present.

A. The partition was changed—so it would be in the way for the doors—so it couldn't be installed in the place where it called for.

Q. Where were these motors fastened to?

A. Straps.

Q. To the ceiling? A. And pipes, yes.

(Testimony of Victor F. Gothberg.)

Q. Up at the top?

A. Yes, hanging there.

Q. How high is the ceiling beams that go across in there? A. Twelve feet.

Q. Then they couldn't install this one because it was in the way of what kind of a door? [98]

A. A six-eight door.

Q. There was five feet and four inches above the top of that door. How big were these heaters?

A. But this was supposed to hang inside.

Q. There is plenty of beams. You could have moved it right or left if it had been in the way of a door—you could have moved it a couple of feet, couldn't you?

A. No, because this was going to heat the rest-rooms at the same time.

Q. You didn't install the equipment then?

A. No.

Q. And that was provided in the specifications?

A. Yes.

Q. You didn't install the three additional thermostats in the show room as provided for in the contract and specifications, did you, Mr. Gothberg?

A. No, I did not.

Q. You didn't do that? A. No.

Q. That has never been done?

A. I believe that was an agreement between Mr. Carr and Anchorage Installation because I asked Anchorage Installation——

Q. You believe—tell what you know about it.

A. I asked him why they didn't install it—and

(Testimony of Victor F. Gothberg.)

he said we had [99] an agreement between I and Carr that we should have only one thermostat.

Q. You got the notice, though, and the request to do it, didn't you? A. Oh, yes.

Q. And then you didn't do it? A. No.

Q. Now, you also were requested, in Paragraph 13, to furnish and install two additional thermostats in the shop. Did you do that? A. No.

Q. Now, then, Number 14 of the demand: "Remove and reset door frames in lead according to terms of the contract." Did you do that?

A. They are set in lead.

Q. Did you do it? A. I did it, yes.

Q. When did you do that?

A. In the fall—when we put in the door.

Q. And you did it when the doors were put in?

A. Yes.

Q. Did you do it personally?

A. No, my men did it. They had orders to do it. I didn't see it—but they had orders to do it.

Q. Do you know how it could get out of there if that door had [100] lead on it—then it would still be there now, wouldn't it? A. I guess so.

Q. If it is not there now then, you are mistaken?

A. I am mistaken, yes.

Q. Now then, Number 15: "Finish building on the outside and inside by cutting off projecting wires used in the construction of the forms, and to finish the building inside and out in a workmanlike manner." Did you ever do anything about that after you got this notice? A. No.

(Testimony of Victor F. Gothberg.)

Q. You knew that wasn't done, didn't you?

A. I know it.

Q. All right, Number 16: "Take out and refinish one section of the cement floor in show room which was frozen during construction and is defective in its present condition." What did you do about that?

A. Nothing, because I can't see any defects in any floor there.

Q. You can't see any defects in any floor there?

A. No.

Q. Did you check back to see whether it was defective or not?

A. I looked at it the same as he did.

Q. When did you look at it?

A. I just looked at it today. I saw it and I was there before [101] and seen it four or five times.

Q. It's painted over today, isn't it, to cover it up? A. It was painted sometime ago.

Q. It has been painted since you were there before? A. Right.

Q. It did freeze, didn't it, Mr. Gothberg?

A. You couldn't call it freeze. There was just a little draft come from the window to the floor and hit the floor—but it wasn't freezing so the concrete is hard.

Q. Number 17: "Do all work necessary to make the floor in the boiler room drain properly as the same is not drained in its present condition." Did you go down there and look at that?

A. I was.

(Testimony of Victor F. Gothberg.)

Q. Could you make that drain?

A. I didn't see any water there.

Q. You knew it had been mopped up, didn't you? A. That I don't know.

Q. Did you put a level on it to see that it drains away from the drainage inside of it, too?

A. No, if I should do it Mr. Carr would have to pay for that because it was time and material job.

Q. It wasn't put in in a workmanlike manner if it ran away from the drain, was it?

A. That I don't know. [102]

Q. I see. Number 18: "Replace the blocks over rear windows in shop which were frozen in construction where mortar has fallen out and especially the blocks at the south end of the building." Did you go and see about that?

A. I looked, yes.

Q. Has the mortar fallen off?

A. Not that I can see.

Q. You will tell the jury it is a good job?

A. From the inside you can see some crack in the mortar and that is not the contractor's fault. He got a stove there and a pipe comes up by the wall—and the wall gets so hot it dried out the wall entirely.

Q. There are holes—and a man can stand inside and see the outside very clearly, can't he?

A. There is cracks. Yes.

Q. Now then, Mr. Gothberg, did the mortar freeze when these blocks were being laid?

A. No.

(Testimony of Victor F. Gothberg.)

Q. Did you furnish any kind of heating system for the men to use in laying those blocks?

A. Yes, we had a fire going there and heated water—and heated sand.

Q. Where did you get this fire going?

A. Right in the building.

Q. What kind of fire was it? [103]

A. Wood.

Q. What was it in?

A. I believe they had it right on the ground.

Q. In the center of the building?

A. Yes, for heating the water.

Q. Was that in the middle of this 50 by 100 foot building?

A. No, it was just about opposite of the twelve-foot door on the building.

Q. Opposite the side or back door?

A. Yes.

Q. Which door? A. The side door.

Q. And that comes in about the middle of the garage portion, does it?

A. No, a little further to the back.

Q. That is all the fire you furnished them?

A. That is all the fire there was, yes.

Q. Did they request you to furnish fire?

A. No.

Q. Did you have a carpenter working there at the time? A. Yes.

Q. Did they tell you the blocks were freezing and you had to have one of those blast furnaces going?

(Testimony of Victor F. Gothberg.)

A. I am a contractor. I wouldn't talk to the carpenters. I wouldn't argue with the carpenters about that—I never [104] talked to any carpenter about the masonry work.

Q. Did you ever talk to any carpenter about having heat where this work was going on?

A. No.

Q. You never did? A. No.

Q. Do you know this gentleman sitting back here? A. I know him.

Q. He worked for you a long time, didn't he?

A. He did.

Q. Did you ever talk to him about heat?

A. I don't remember. I am sure I didn't talk about the masonry with the carpenter.

Q. But you know there is a regular heating system where they put canvas over it and heat is blown into the place where the concrete is laid, don't you?

A. I know about that, yes.

Q. It was used at the hospital at the same time you were building there, wasn't it?

A. That I don't know.

Q. Did you have anything to do with the hospital? A. No.

Q. I beg your pardon, I thought you did. You did know there was an adequate method then to prevent the freezing of concrete? [105]

Mr. Arnell: I wish to interpose an objection. I think Mr. Bell has gone far afield. The witness testified he didn't use a certain method, whether he

(Testimony of Victor F. Gothberg.)

was working on the hospital or thirty other buildings—it is immaterial and this question merely pursues that same line of thought.

Court: Very well, you may answer. That is not to imply there was any freezing. Do you know if there is an adequate method to prevent freezing of concrete?

Mr. Gothberg: There is, yes.

Q. Did you know it then, Mr. Gothberg?

A. Oh, yes.

Q. And you didn't use it?

A. No, because it wasn't freezing. It wasn't that cold.

Q. How cold was it when those concrete blocks were being laid? A. That I can't state.

Q. Could you give us the approximate date?

A. I would have to look it up in the books. Otherwise I don't know.

Q. Was it in Demember at all?

A. Not in December.

Q. Well, was it in January?

A. In September and October.

Q. And you can't remember the date?

A. No. [106]

Q. All right. Now when you were down there today, did you check to see if the windows in the shop were loose?

A. I checked some and I couldn't find any loose.

Q. You couldn't find any loose up there?

A. No, I didn't check all but I checked a few —and they were all solid.

(Testimony of Victor F. Gothberg.)

Q. Could you see the light by looking around the windows? A. No.

Q. What is between the windows and the concrete wall?

A. Some is steel—and some is wood.

Q. Well, what is between the two to keep out the wind and all? Is there any insulation?

A. There is caulking compound.

Q. Did that stop the light from shining in when you were down there today? A. No.

Q. The light came right in?

A. The light comes right through the windows, of course.

Q. I mean from around the frame.

A. I couldn't see any light through there any place.

Q. Now, Number 20 in this demand states: "You are notified that the contract provides for one coat of red lead and two coats of aluminum on all steel and that no red lead was used, and only one coat of aluminum paint, therefore, you are notified to comply with the terms of the contract and [107] use the proper coats of paint." Did you do that?

A. That is done, yes.

Q. When was it done?

A. That was done—the red lead paint was put on in the factory—and two coats of paint was put on in the field.

Q. When was that done—about when?

A. I don't know when the first coat was put on but it was on when I came to that place—I don't

(Testimony of Victor F. Gothberg.)

know—probably it was on for ten years. I don't know when the steel was made up but the contract provide it should be done—that is charged to the one that buys the steel.

Q. Did you ever check to see if it was done?

A. I checked it and it was on.

Q. You will testify it was done, will you?

A. That I will.

Q. Did you ever see any red lead put on there?

A. No, because it was already on.

Q. Who put it on then?

A. The factory in Seattle—or wherever he got the steel.

Q. But the contract provided for one coat of red lead and two coats of aluminum. Did you ever put those on?

A. There was one coat of red paint on—and there were two coats of aluminum.

Q. You figure the people who put it on in the factory—that that would comply with the terms of the contract? [108]

A. No, it always comes with one coat of paint on.

Q. But you didn't put any red lead on or have any red lead put on? A. No.

Q. And you didn't have only one coat of aluminum paint put on?

A. There was two we put on. I asked the painter and he said he put on two.

Q. You knew that Mr. Carr objected to it at the time, and told you then that they weren't putting the red lead on, didn't you?

(Testimony of Victor F. Gothberg.)

A. I never heard a complaint until I got that letter a year and a half after the job was finished.

Q. Now, your contract provided that you would install the air compressor, didn't it?

A. Right.

Q. Now then, do you know whether or not Mr. Carr had to pay to assemble and reinstall the pipe in connection with the air compressor?

A. If he paid anything—I don't know.

Q. You do know that he did have somebody working on the air compressor there, didn't you?

A. Anchorage Installation.

Q. And he had to pay for it, didn't he?

A. Who? [109]

Q. Mr. Carr.

A. That I don't know because I believe I am charged for that from Anchorage Installation.

Q. You just believe you are charged with it?

A. I will have to check up on that?

Q. I see. Now, was your attention called to the fact that the shop floor was tremendously out of level?

A. There was two places—and it was fixed at the time—the day after it was poured—and after that I never heard any complaint before I received this letter.

Q. Mr. Carr objected strenuously to the way it was being put down, didn't he. Just put down by eye and nothing was used to keep it level?

A. They had a straight edge to level it off with.

Q. Just a straight edge laid over the concrete?

(Testimony of Victor F. Gothberg.)

A. Just a two-by-four like this.

Q. That is all you ever do?

A. That is all they ever do.

Q. Did you go back and look at it when the snow was melting off of the cars in there?

A. No.

Q. You did know that from walking over it you almost stumbled because it was so uneven.

A. I know it had two places that was hollow so they were filled in. [110]

Q. About how big were those hollows?

A. About a quarter of an inch.

Q. And you put a coat of stuff over that?

A. That's right.

Q. That's all you ever did to the floor?

A. Right.

Q. Now, you were supposed to put some floor drains in the garage, weren't you?

A. That's right.

Q. Did you look to see what they put in there?

A. Oh, yes.

Q. They broke right through the first car that got on them, didn't they?

A. I don't know anything until I got that letter a year and a half later.

Q. Did you go down there to see?

A. No, I never knew there was any damage on those—I never got any notice about it so I didn't know.

Q. Did you know it cost them $37.50 to replace or put in proper covers for those drains?

(Testimony of Victor F. Gothberg.)

A. I didn't know it then. I knew it when I got that letter.

Q. Did you ever finish the walls in the men's restroom?

A. No, it don't call to finish it on the plan.

Q. Did you give Mr. Burton E. Carr credit for the cement blocks that you took away from there?

A. I did, yes.

Q. How much did you give him credit for?

A. I don't remember now how many there was —one place about eighty block—another place twenty-nine—something like that. I don't remember exactly but it's on the list there.

Q. When you got this notice from Mr. Carr to give you credit for those blocks, did you ever let anyone know that you would be willing to give credit for these blocks you had hauled away?

A. He had it on the bill. It was taken off on the bill already.

Q. You don't know whether those were mentioned on the bills or not, do you, that he got?

A. The blocks?

Q. Yes.

A. He mentioned in his letter, yes.

Q. Now, you did agree to install proper exhaust pipes with swivel of a manufactured and recognized product, according to the contract, didn't you?

A. That is installed according to the plans and specifications and the drawing.

Q. What did you put in there instead of the regular manufactured swivels?

(Testimony of Victor F. Gothberg.)

A. They don't call for any regular manufactured —read the specifications—that is installed exactly by the specifications— [112] I believe there was even a special drawing made for it.

Q. I will come back to it. You did try to charge him for the beams leading between the show room and the garage, didn't you, as extras?

A. Certainly, because that wasn't in the contract. I couldn't put that in for nothing.

Q. The specifications called for five doors and one two-way swinging door with kick plates and push plates on them, didn't they?

A. Read the specifications there and you will see that it don't.

Q. What did you think you were going to put in those openings shown on the plans?

A. At the time I didn't know what he was going to put in there because I didn't figure in any bid.

Q. You did add in these extras that Mr. Arnell showed you this morning—you did have those doors installing them?

A. Certainly. They were extra.

Q. That is part of the extras you are trying to collect for?

A. Yes.

Q. I see. Now, the doors out front—after you changed those locks were pretty badly hollowed out —weren't they broken up?

A. No, they are not broken up. I looked at them and they are [113] very good—in perfect condition even today.

(Testimony of Victor F. Gothberg.)

Q. When you take out one lock and put in a different kind of lock, it butchers it up?

A. Not necessarily.

Q. Did they have to plug up the holes?

A. That I don't know—I wasn't there.

Court: We will suspend now. Ladies and gentlement of the jury, during the recess you will remember the admonitions of the court as to duty and the court will stand in recess for ten minutes.

Whereupon the court at 3:00 o'clock p.m. recessed until 3:10 o'clock p.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present. Counsel may proceed with examination.

Q. Do you have the specifications there before you, Mr. Gothberg? A. No, I haven't.

Q. Now, would you please turn to Section 5—1. Do you have it there?

A. Section 5, page 1?

Q. Yes. That is Builders Hardware and Miscellaneous Metals. A. Right.

Q. I will ask you if on that page it doesn't say this: "Each inside door with the exception of the triple doors shall be [114] supplied with the following hardware." Do you see that there?

A. I see it.

Q. "One pair of 3½-inch butts, one latch set with cylinder lock, one kick plate." Do you see that there? A. I see that.

Q. And right under that: "The triple doors

(Testimony of Victor F. Gothberg.)

shall be supplied with the following hardware: Two folding doors, one—one-half pairs of 4-inch butts each door, one chain bolt each door, one foot bolt each door, one ball bearing coaster each door." Do you see that there?

A. I see it.

Q. All right. "Swinging door"—right below that —"Two pivots with double acting checks, two push plates, two kick plates, one cylinder lock." Do you have that there? A. I have.

Q. Now: "Metal clab door, two pair 4-inch butts, one latch set with cylinder lock, one door closer with necessary brackets." Do you find that there?

A. I find it.

Q. Now, you didn't put any of those in, did you?

A. Oh, yes.

Q. Were those the ones you charged extra for and testified about the extras this morning?

A. That's only for the swinging door—that's extra—and also [115] for the two other doors—that's extra.

Q. They are all provided for there—why do you say you are entitled to sixteen hundred and some odd dollars for extras?

A. I said it states on the specifications here—in the front—how much I am supposed to do. If you go down to the specification on page SW-1: "This work shall include a concrete apron by the gas pumps but shall not include the wall board or finish carpentry on any interior partitions with the exception of the shower room and one rest room."

(Testimony of Victor F. Gothberg.)

Q. Well, that doesn't say anything about the doors being exempt, does it?

A. That includes all the trim work—and all walls inside.

Q. The first original contract provides for a wall through there, doesn't it? And the specifications provide for a cinder block wall through there?

A. Right.

Q. You never did put the cinder wall in, did you? A. No, I put the partition instead.

Q. That is what you charged extra for?

A. I didn't charge extra for that partition.

Q. What was that $1600 and $1300 you testified about this morning?

A. There is a lot of work in that place.

Q. You left one partition out and put another one in? [116] A. Right.

Q. And you charged him for that partition?

A. I didn't charge him for that.

Q. What did you charge extra for?

A. For the balance of the partition, too—and furring out the walls in the show room—and putting in the ceiling in the show room.

Q. Putting in what?

A. The ceiling—and ceiling in the two offices there—and ceiling in the part where they stored the parts—in that room and partitions.

Q. The contract and specifications didn't provide for any kind of finishing in that building?

A. Not a thing.

Q. Just a naked wall? A. Not a thing.

(Testimony of Victor F. Gothberg.)

Q. Where were these doors going to be? Were they to be stacked in the corner or to be hung?

A. At a later date—it was up to him—he could even have another fellow install them because it wasn't included in this contract. Exclude everything except the shower room and the restroom—that is all that was in my contract.

Q. Why did you sign and approve that specification to furnish those doors and to hang them?

Mr. Arnell: He signed them and why he signed them is not [117] material at all.

Court: I think that is right. It is a matter of argument to the jury if it is even arguable.

Q. When we had the recess I had just asked you about removing the old doors and furnishing the new. I believe you stated you didn't think that was necessary. A. Certainly not.

Q. All right now. No. 30: "Make proper repair and adjustment for failing to use heavy wire mesh in gas pump lanes as called for in the specifications." I believe you told Mr. Arnell you didn't use any mesh at all? A. I did.

Q. And you haven't done anything about it since either, have you?

A. There can't be anything done about it now except to take the floor up.

Q. Is there any cracks in——

A. There is not one crack in it.

Q. You looked that over carefully, did you?

A. Oh, yes.

Q. All right, but you didn't use the wire?

(Testimony of Victor F. Gothberg.)

A. No, because——

Q. Now, No. 31: "Eliminate from extras your charge for installing a hoist which was included in the contract." Now that installing of that hoist was included in the [118] contract, wasn't it?

A. Not that type of hoist.

Q. How much did you charge him for installing that hoist?

A. I believe it was 40% on the cost.

Q. And what was the cost of installing?

A. That I can't remember outright.

Q. You never installed mirrors in the restrooms, did you? A. I did—they are there.

Q. They were left sitting on the floor, weren't they?

A. Well, one—that had to be put up temporary so I asked the fellow where I should put it and he said just to leave it on the floor—and the other one—I hung that one.

Q. Did you hang it with a piece of wire?

A. No. We nailed it in and screwed it in—whatever it was—to the wall—solid.

Q. Now, you were asked in this sub-paragraph 34, to furnish an itemized statement of the payroll for the month of February, 1952, and to show what part of this payroll was extra and what part was in the finishing of the contract. Did you ever do that?

A. I believe Mr. Arnell got all that there.

Q. But you never did give it to Mr. Carr, did you? You never did furnish that payroll to him?

A. The way I understood it—was to come up in

(Testimony of Victor F. Gothberg.)

court. I wasn't supposed to deliver it to him. [119]

Q. You never showed him that payroll, did you, yet?

A. No, but it is there if you want it—you can have it.

Q. You didn't finish the contract on time because you were finishing it on the first of December, were you not?

A. Right, and it was—the contract calls for a monolithic pouring and as long as he did not come there with the hoist—so I could install those—it was delayed, so I couldn't put in the floor before I got the hoist.

Q. How long had the hoist been there before Christmas?

A. It wasn't there before Christmas. I believe it was in between Christmas and New Year's.

Q. You knew where the hoist was in town—it could be delivered any day?

A. I asked him many times—and I didn't get it. I didn't know whether it was in town or in Seattle.

Q. It was there over a month before you ever poured any concrete, wasn't it?

A. We started to install it the day after he brought the hoist over.

Q. Did you ever ask him for the hoist?

A. Oh, yes.

Q. Did you ask Mr. Carr for it?

A. I did, yes.

Q. When did you do that?

A. Quite a few times. [120]

(Testimony of Victor F. Gothberg.)

Q. Did you tell him that it was delaying anything?

A. Oh, yes. He knowed that just as well as I did.

Q. Do you know whether or not Mr. Carr had to pay $175.00 to the Anchorage Installation Company for the connection of the pipe to the car washrack?

A. That I don't know—if he did it seems foolish to me because he was supposed to send the bill to me —regardless.

Q. But you never did pay it and he had to pay it?

A. Any bill that came to me—it's paid.

Q. Did you ever give him credit for that $175.00 he had to pay?

A. I never did because I didn't know if he paid it.

Q. Mr. Gothberg, did you ever put the hand railing on the stairs that went down into the basement?

A. No, that was eliminated on account of the change in the shower room—so the wall goes all the way out there.

Q. Well, there should be a hand railing there, should there not?

A. There should be, yes.

Q. And you never did install one?

A. No, and if I did it would be extra because that wasn't in the contract—that was extra—for the digging and the basement—and the whole thing. It would be charged to Mr. Carr because it's not in the contract.

Q. If it was provided in the specifications, then, you should [121] have done it, should you?

A. Right.

(Testimony of Victor F. Gothberg.)

Q. And if it is in the specifications, then it is your fault, is it? A. Yes.

Mr. Bell: All right, that's all.

Court: Is there any redirect examination.

Redirect Examination

Q. (By Mr. Arnell): You have before you Defendant's Exhibit D. Mr. Bell has questioned you at some length now about these various defects. Had Mr. Carr ever, at any time prior to the service of this notice upon you, made known the so-called objections, if you recall?

A. Never anything—except the window.

Q. What window? Is that the front window?

A. Yes, that is the only thing he ever asked me about.

Q. Now, in regard to Item 2—charging you with failure to hook up the lights on the 7600 pump. Was the electricity run to the island where the pump was located?

A. It was, yes.

Q. To your knowledge, was the electricity hooked up to the pump itself?

A. It was as far as I know. I never heard anything about that until I got this letter a year and a half later. [122]

Q. The next item—No. 3: "One globe and window light. What kind of a globe would that be?

A. That is a regular light bulb.

Q. 50 or 75-watt light bulb?

A. I could be a hundred. I believe a hundred.

(Testimony of Victor F. Gothberg.)

Q. To the best of your knowledge, was also the window light furnished there?

A. As far as I know—I would notice if it was out at the time—I believe it was there.

Q. There is none there now?

A. There is none there now.

Q. Now, was Mr. Carr out on the job site at the time you were doing the construction work on the marquee?

A. Oh yes, he was there every day. Not all the time, you know, but he was there almost every day.

Q. Did you discuss with him this additional charge of $500 that is specified in Section 6 of this notice?

A. I never did discuss that particular deal because anything extra was to be charged—according to time and material. He knew it was put in, yes.

Q. Did he ever, prior to the time this notice is dated, make any objection to that $500?

A. He never mentioned that.

Q. In item 21 on page 3 of this notice, Mr. Gothberg, there is reference to a beam. Mr. Bell didn't bring that out. [123] What beam does that refer to?

Mr. Bell: The reason I didn't do it—it had been gone over and over before and I didn't want to take the time.

A. That is the beam over there by the door—as I showed on the plan yesterday—and it had to be moved back twelve feet so the door opened all the way up—otherwise it would hit that beam—and wouldn't open all the way up.

(Testimony of Victor F. Gothberg.)

Q. Now, did you allow credit for all of the blocks that were not used as a result of the change in the installation of the door? A. I did.

Q. And the other changes?

A. It's right on the bill there.

Q. Now, Mr. Gothberg, according to your best estimate, how many man hours would it take to perform the necessary clean up work that might be required by your contract?

A. As it stands now—to finish the whole thing—it should take two or three days.

Q. How many men?

A. One man—that should be the most.

Q. Would that include what necessary work is required as a result of the shrinkage of the block?

A. It would include that, too.

Q. With respect to that shrinkage, would you explain again to the jury why that had occurred?

A. On account of too much heat. They installed a stove there and the stove goes right up against the wall—then it dries up all the moisture off the blocks so they shrink a little—and that is not the contractor's fault whatsoever—they can't help things like that.

Q. Now, Mr. Carr by this notice in Item 34, asks you for an itemized statement of your payroll for the month of February, 1952. Had he ever made such a demand upon you prior to May of 1952?

A. Never before I received this.

Court: Did you receive that letter or demand before or after the suit was started?

(Testimony of Victor F. Gothberg.)

Mr. Gothberg: That was after the suit was started.

Q. Mr. Gothberg, in regard to the ramp, some point was made of that—that no mesh was put in. Will you state why not?

A. Mr. Carr was supposed to furnish the mesh—and there was none left because it was all used in the floor—and there was no place in town where we could buy any.

Q. What did you do to compensate for the failure to use the mesh?

A. I mixed an extra half bag of cement in each yard of concrete.

Q. In other words, you tried to make a richer mix of concrete to compensate for the lack of mesh?

A. That's right. [125]

Mr. Arnell: No further questions.

Court: Any further cross examination?

Mr. Bell: I think not at this time.

Mr. Gothberg: There's one question—I wonder if I could make a statement?

Mr. Bell: Object to a voluntary statement.

Court: You better speak to your counsel.

Mr. Arnell: May I ask a question, your Honor?

Court: You may.

Q. This morning, Mr. Gothberg, you were asked regarding the installation of a pump and you stated you did not install it?

A. Right.

Q. Do you wish to clarify that statement?

A. Right. You see—this Anchorage Installation

(Testimony of Victor F. Gothberg.)

did that work. I didn't do it myself—but they did it on my account and I had to pay for it.

Q. When you answered this morning, you meant you did not personally install it?

A. That's what I meant. That I did not personally put it in.

Court: Did Anchorage Installation install it, if you know?

Mr. Gothberg: They did—and they moved it three times.

Court: Was that charged to you?

Mr. Gothberg: That was charged to me. [126]

Court: And did you pay it?

Mr. Gothberg: Yes.

Mr. Arnell: All right. No further questions.

Mr. Bell: Just one more thing—two or three questions.

Recross Examination

Q. (By Mr. Bell): This BCG 8 that I am referring to—what is that drawing of right there?

A. That is a hand rail.

Court: Is that in evidence, Mr. Bell.

Mr. Bell: The other one is in there possibly.

A. But the way this is extended out to the wall—there can't be any such thing at all. That eliminates this hand rail.

Q. You admit that the plan does show the hand railing—the railing? A. It does, yes.

Q. And you never did put the railing in?

A. No.

Q. Now I will ask you——

(Testimony of Victor F. Gothberg.)

A. There is no place to put it now—it can't be put in.

Q. I will ask you if this plan does not show that particular two-by-twelve—doesn't it show the steel beam that you are referring to—a large steel beam?

A. Yes, it shows right here.

Q. And this particular plan that you have before you, BCG 8, [127] does show that particular beam on it, doesn't it? A. It does, yes.

Mr. Bell: That is all.

Redirect Examination

Q. (By Mr. Arnell): Mr. Gothberg, will you point out which beam you are talking about, please, for the benefit of the jury?

A. This beam that comes across here—from one side of the building to the other.

Court: Is that beam shown in there a part of the drawing?

Mr. Gothberg: No, but they called for on the specifications there—Mr. Carr would furnish that beam.

Q. Where is the second beam?

A. It goes on the top of this part—six feet higher up.

Q. Above the joists?

A. Yes. This is the cross picture.

Mr. Arnell: That's all.

Recross Examination

Q. (By Mr. Bell): Now, Mr. Gothberg, you made

(Testimony of Victor F. Gothberg.)

a statement I would like to clarify. You said the specifications provide that Mr. Carr would furnish that beam. Would you please show us in the specifications where he is to furnish it?

A. I read it before. I can read it again. On page SC-1—"Structural steel is on site but is not in place and consists [128] of so many pounds." They don't state pounds—it is blank.

Q. You said this morning you inspected that steel, didn't you? A. No.

Q. Well, you checked it?

A. No.

Q. You didn't say that this morning?

A. I was never at the site when I figured this plan —so when it says here I don't have to furnish steel —I wouldn't figure it in my estimate.

Q. Does it say that all additional supplies you will furnish——

Mr. Arnell: Your Honor——

Court: Objection sustained, if it is an objection.

Q. Does the specification provide that all additional material other than what's on the ground will be furnished by you?

Mr. Arnell: We interpose the same objection. The specifications speak for themselves.

Court: The witness can state if he knows whether there is any such provision.

A. There is in the back—but this is a special condition that overrules everything that's behind it. They govern the whole thing.

Q. Then you can't show us any exception to that

(Testimony of Victor F. Gothberg.)

statement that you agreed to furnish all additional material where it was needed? [129]

A. That's right.

Mr. Bell: I see. All right.

Court: Where is that provision about furnishing additional——

Mr. Gothberg: That is in the back someplace.

Court: Can you read it?

Mr. Gothberg: Right there. It says what's to be done—furnish all labor and material—but in that case they could claim I should pay for all the steel.

Mr. Bell: That is a voluntary statement of the witness and not responsive to the question.

Court: That is a matter of argument.

Mr. Bell: Object to that and ask that it may be stricken.

Court: It may be stricken. Counsel may argue it.

Mr. Arnell: What section of the specifications is that, your Honor?

Court: It is SW-1, apparently, and it reads in part as follows: "The work consists of furnishing all plant labor, equipment and materials and performing all work in strict accordance with these specifications and drawings, forming a part hereof, for completing the construction of the Nash Garage at the corner of Fifth Avenue and Denali Street in the City of Anchorage"—and there is further detail. The last paragraph on that page is as follows: "Additional finish work may be added to the contract from time to time." And then on the next page: [130] SC-1, which is "Conditions existent at

(Testimony of Victor F. Gothberg.)

time contract takes effect: A—Footings and Foundations, as well as boiler room walls are in place. B — Backfilling of existing concrete is complete. C—Structural steel is on site but is not in place and consists of blank pounds. D—The following number of pumice blocks are on site but not in place: (1) Approximately 3,250—8x8x16—standard. (2) Approximately 60—8x8x16 bullnose. (3) Approximately 90 — 8x8x8 — double bullnose. (4) Approximately 17 — 8x8x8 — single bullnose. (5) Approximately 90 — 8 x 8 x 16 — double bullnose. E—Insulation for roof construction in the quantity of 5,120 square feet is warehoused within the city limits. F—Approximately 4,500 feet of one-quarter inch pencil rod."—Are pencil rods the rods which are put in the concrete to strengthen it?

Mr. Gothberg: No, to hold the forms together when we are pouring the concrete.

Court: And those rods—after the concrete is poured—are usually cut off?

Mr. Gothberg: Yes.

Court: Does counsel care to question the witness any further?

Mr. Bell: Nothing more on my part.

Court: You may step down. Another witness may be called on behalf of plaintiff.

Mr. Arnell: We have no other witness to call, your Honor. [131] Before I rest, I would like to make a request to the court for permission to file an amended complaint showing substantial performance. I think the phraseology of the existing

complaint is not perhaps complete enough to raise that point.

Mr. Bell: Your Honor, object to it at this late time. I don't think that he should be permitted to change the complaint in any way.

Court: Well, the changes that are requested, as I understand them, are merely to have the complaint conform to the proof so far as given, is that right?

Mr. Arnell: That is the purpose, your Honor.

Court: The objection is overruled and the complaint may be amended to conform with the proof given.

Mr. Bell: At this time I move to dismiss now as to Mrs. Marie Carr. There is no evidence that she had anything to do with it, and it is quite properly shown that she didn't sign the contract and had nothing whatever to do with it.

Court: Would counsel for plaintiff care to argue that?

Mr. Arnell: At this time, your Honor, we have no direct proof that she had any part or participation in this contract. However, we do not know, and probably won't know until the end of the case, whether or not she has any interest in the property involved—and that is the purpose of my objection to dismissal as to her at this time. We do not know whether Mr. Carr and Mrs. Carr have had any transfer of this property between themselves or Mr. Carr has any current interest in the property, or whether the contract has been transferred to his wife.

Court: If there is any such proof it will have to be offered in court and the court will pass upon it, but at the present moment, there is nothing to show Mrs. Carr has any interest whatever in this action. Therefore, minute order may be made dismissing the action as to the defendant, Marie Carr, by reason of lack of proof of her responsibility for anything connected with it.

Mr. Arnell: Mrs. Carr has signed this notice of demand along with Burton E. Carr.

Court: Well, the order of the court is set aside. If Mrs. Carr wants to make herself a party, I guess we can't stop her.

Mr. Bell: She was already made a party, your Honor, when that notice was filed. She was a defendant in this suit. She filed an answer in the case, too, but she was forced into it by being sued. She had a right to demand to know why they were suing her. I don't think that that should change your Honor's mind a bit.

Court: I will reserve decision for the present.

Mr. Bell: Now, at this time I move to dismiss the action as against Burton E. Carr for the reason that there is no showing of compliance with the contract. There is an admission that [133] he did not comply and then sued on the contract and there is an admission that he did not comply with it.

Court: The motion is denied.

Mr. Bell: Exception.

Court: Witness may be called on behalf of defendant. I will consider over the evening this

motion to dismiss as to Mrs. Carr. At any rate the decision is reserved for the present.

Mr. Bell: Call Burton E. Carr.

Whereupon

BURTON E. CARR

was called as a witness in his own behalf and after being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bell): State your name, please.

A. Burton E. Carr.

Q. Are you the Burton E. Carr who signed the two contracts that have been introduced in evidence here? A. Yes, sir.

Q. And one of those was dated the 19th day of September, 1950, was it?

A. Yes.

Q. And the other one in May, I believe, of 1950?

A. Yes.

Q. Mr. Carr, at the time you made this contract with Mr. [134] Gothberg, had he been on the premises and observed the conditions there?

A. You mean after——

Q. At the time you signed the contract with him, had he examined everything there at the building?

A. Yes, I showed him all the steel—and we checked all the steel out from where I bought it —and that was all checked out—and I showed him where all the beams and everything was that we were furnishing.

(Testimony of Burton E. Carr.)

Q. Did you show him the foundation that was in at the time?

A. Yes.

Q. How long had this foundation been in, Mr. Carr?

A. Oh, well, I believe that foundation was in when he inspected it on the bid, because we had to have this foundation. The city made us move this foundation back before we went ahead with the building.

Q. Who had put this foundation in?

A. Breeden and Smith put the original foundation in—and that was about between six and seven feet deep.

Q. Between six and seven feet deep?

A. Yes.

Q. Did that go all away around at that depth?

A. Yes.

Q. Did you make it clear to Mr. Gothberg the depth of that foundation? [135]

A. Yes, I told him what the depth of it was.

Q. When he later entered into the contract to cut the foundation off and restore the foundation back where it should be, did he put the foundation in the same depth that the other foundation was in?

A. No, not the front part. I don't know about the back part but I know the front part wasn't. It was shallower by three feet. He was about two feet short and I asked him about it—and the engineer, too, asked him about it—and he said that was just as good footing as if it went all the way down—

(Testimony of Burton E. Carr.)

and after that the building cracked all the way to the top.

Q. How long was it, after he put the building in, that that front cracked?

A. Well, we had a little earthquake—a little tremble—and that cracked—I would say half an inch at the top—and it goes on down all the way through.

Q. How long was that after the front part of the building had been put in?

A. It cracked within a month—or less than that. I just noticed it all at once—but I imagine it just kept going.

Q. Who is this engineer that you refer to?

A. Lorn Anderson.

Q. How did you come to get in touch with Lorn Anderson?

A. Well, that is a long story.

Q. Well, did Mr. Gothberg have anything to do with it?

A. Yes, Mr. Gothberg recommended Lorn Anderson for the job. He said he was a good architect —and that he would do the job for me very reasonable.

Q. Then did you employ Mr. Anderson on the recommendation of Mr. Gothberg?

A. Well, there is a Mr. Anderson—and then there is a Mr. Smith in there, too, the two together —but Lorn Anderson was a registered engineer, and Mr. Smith—I don't know—but Smith did the most of the talking.

(Testimony of Burton E. Carr.)

Q. Now, how long had Mr. Gothberg and this engineer been friends, or did you find out?

A. I wouldn't know—the only thing Gothberg said—that he drew quite a few plans out at the base—that he was well satisfied with—and he recommended him very highly for drawing of plans at a reasonable price.

Q. How much did you pay this engineer to draw those plans?

A. It cost me $2700—and my understanding was it would be between Five and Six Hundred Dollars —I paid for it.

Q. And when you got the bill, it was for $2700?

A. Better than Twenty-Seven Hundred and some odd dollars.

Q. When did you pay that?

A. Right after they built it. I asked Mr. Gothberg is everything and all these plans complete—and he told me they were—and Gothberg said they was. I went to Smith [137] first and then I asked Mr. Gothberg—and he said he was satisfied with them. They was all complete and they wanted their money right then—because one wanted to go out to the States for a vacation—so I paid them.

Q. That was before the building was complete?

A. Yes, sir.

Q. Did you ever see that engineer on that building or around the building after the building started?

A. The only time I remember him being there —he came—he would come there—I went down

(Testimony of Burton E. Carr.)

there practically every day and in the evenings I would go down there when he was supposed to show up—and he wouldn't show up. Under the foundation—on the corner—I dug down and inspected it —and I found out what the trouble was and covered it back up.

Q. And then he claimed to you that he dug down there, did he?

A. Yes,—he couldn't have because it was all frozen when I dug down—and he didn't show up—and I put a marker on there—but it never was dug again in that one corner.

Q. Then you never did know of the engineer being anywhere about that building after he got his money?

A. No, I don't. I called him up a number of times over the telephone and he said he would go see about this and that. We wanted heat for the building—and he wouldn't furnish it—and I would get after him and we kept going [138] around and around, and couldn't get any place.

Q. Did you ever talk to Mr. Gothberg about furnishing heat when these blocks were being laid?

A. A number of times.

Q. What did he say?

A. It cost too much. He said he would guarantee the building—if anything happened to it he would replace it.

Q. What time of the year was it when he laid those blocks?

A. About twenty below zero—because when they

(Testimony of Burton E. Carr.)

were putting the blocks on it was frozen—and they would slap this mud—they call it—on, and it would freeze solid—and they would have to take a chisel and chisel it off. Mr. Gothberg claimed when that thaws out in the summer it will set and be all right—but it was just sand and cement. And they put a lot of stuff in there that was supposed to heat it up a certain amount—but it didn't help because even the mud they was mixing would freeze. They had a few sitting there that was frozen solid. They would mix one—and use it—and mix another—and the second one would be frozen before it could be used.

Q. Did they ever use a heater or canvas to protect them in any way? A. No, they never did.

Q. Do you know whether or not one of the men that was employed by him cautioned him against that—that it wouldn't [139] be any good?

A. Quite a few men quit—and other guys had to complete the work.

Q. Do you know whether or not he ever talked to him, in your presence, about getting heat for these blocks?

A. No. I asked them how they could work in that cold and they said they can't.

Q. He testified about a fire. Would you describe that fire?

A. Pieces of two-by-four—pieces of old scrap lumber—that's all it was.

Q. Where was the fire built?

A. In the center of the building?

Q. How big is the building? A. 50 by 100.

(Testimony of Burton E. Carr.)

Q. And that is the only fire you saw there at any time? A. The only one.

Q. What about the freezing of the floor—in the office or show room part?

A. Well, part of it he replaced—around the doors—but then around the windows—we were figuring on putting tiling in there—but it was so rough I was afraid the tile wouldn't hold so I just painted it. I don't know how many coats of paint—and it is still not nice looking as it should be—I really wanted tile.

Q. Did some of the concrete floor in the show room freeze? [140]

A. Yes, it's still frozen—you can see it around the windows there.

Q. What about this big iron beam that he has referred to? Did he ever mention to you that that was extra until——

A. No, he never did. I didn't know it until I received the bill.

Q. What date was it that you received the bill?

A. He marked it on that envelope. He handed it to my wife as she was going out the door—and Mr. Gothberg brought the bills—and in his presence I marked on it "March 4th" that he give it to her—so she asked him why didn't he bring it in before, Mr. Gothberg, and he said it was down at the First National Bank. Well, we should have had it—not the First National Bank.

Court: March 4th?

Mr. Carr: March 4th.

(Testimony of Burton E. Carr.)

Mr. Arnell: What year was that?

Mr. Carr: That was this year—1952. He came in about four days after we sold out.

Q. Is this the envelope you are referring to, Mr. Carr?

A. Yes, that is the envelope right here.

Q. What date is marked on that?

A. March the 4th, 1952.

Q. Was that the date that you got the statement? A. Yes, that's the date. [141]

Court: We will stand in recess for 10 minutes. The jurors will remember the admonitions of the Court as to duty.

Thereupon the court at 4:00 o'clock p.m. recessed until 4:12 o'clock p.m., at which time the following proceedings were had:

Miss Wise: I wanted to know what is the difference between the specifications and the contract. What's the technical difference? Can you define them? What's the difference between them?

Court: As I understand it—the specifications, once they are agreed to, are part of the contract. We will say that someone is to put up a building—then all of the structural details are put out in plans. I hope counsel will correct me if I go wrong. But when a contract is made to do a piece of work like constructing a building, it is not feasible to put the whole thing in the main contract, which designates the location of the building, and the amount of money that is to be paid for it, and so on. So the contract is made up and signed—and it

(Testimony of Burton E. Carr.)

contains the provision that the work will be performed and the job done according to the plans and specifications. Now, the plans and specifications are all made up beforehand, and all of the parties know about that. There is a drawing of the building, and then drawings are mimeographed in a fashion that we call blueprints, and they are the plans showing detail of the structure and all other details of [142] construction. The figures are put in another batch of papers, called the specifications, and the specifications tell how many doors are to be put in, how many ceilings, how many door knobs, how many kick plates, and so on. All of the details are put in the specifications. Thus the plans and specifications are made up in advance and frequently submitted to a number of contractors—and the contractors bid upon them and the one that gets the lowest bid is awarded the contract. But the specifications, when the contract is signed, are just as much part of the contract as though written in the main contract itself, although the specifications may not be signed by the parties. In this case the plans were initialed by the parties, so as to identify them, and I haven't looked at the specifications in this case to know whether the specifications are signed by the parties or initialed or not. Maybe counsel can tell me.

Mr. Arnell: I don't think they are.

Court: Both of the parties are bound by the specifications. They are obliged to conform to the specifications and to the plans unless the parties

(Testimony of Burton E. Carr.)

themselves modify them later. There is nothing to prevent the parties, after the contract is signed and specifications made up and so on—there is nothing to prevent the parties from making changes. Frequently, a person having a building or something else constructed will want something else done more elaborate, or less elaborate, [143] and, if agreed to, it may become part of the specifications, although not written in the specifications. Do you think that answers your question sufficiently? Has counsel any criticism to make of this?

Mr. Bell: Your Honor, I think your explanation was clear and good.

Court: Thank you. All right, the jury are all present. Counsel may proceed with examination.

Q. Mr. Carr, I hand you a check on the First National Bank, dated November 16th, 1950, and ask you to state if you know what that is?

A. That is $175.98, made out to Anchorage Installation.

Q. Was that paid by you?

A. That was paid by me.

Q. What was that for?

A. Well, that was to install the washmobile—it says in the contract—so when they installed the pipes, the contractor never noticed what size pipes to put in for the washmobile, so I naturally couldn't use it—and so I was opening up for business in the next few days—so I asked Mr. Gothberg about it and he said he wouldn't do any more about it—so then I had the Anchorage Installation come in

(Testimony of Burton E. Carr.)

to make that change—and so he said o.k.—that they will change it the way it's supposed to be—so they took all the pipes out so I couldn't use it at all—then they come in with a piece [144] of paper for me to sign—for me to agree to pay for it—so I had to pay for it to go in business.

Q. Was that covered in the contract with Mr. Gothberg? A. Yes.

Q. Did the check clear through the bank and clear to them? A. Yes.

Q. Is the check in the same condition it was when you received it back from the bank?

A. The same thing, yes.

Mr. Bell: We offer it in evidence.

Court: This check is payable to Anchorage Installation?

Mr. Carr: Anchorage Installation, yes.

Court: Is there objection?

Mr. Arnell: No objection, your Honor.

Court: It may be admitted and marked Defendant's Exhibit E. How much is it?

Clerk: $175.98.

Mr. Bell then read Defendant's Exhibit E to the jury.

Q. I hand you a statement here and ask you to state if that was given to you? A. Yes.

Q. By whom? A. By Mr. Gothberg.

Q. And is that in the same condition that it was when you received it, other than the one notation on the bottom? [145]

A. It is the same thing—except the one notation

(Testimony of Burton E. Carr.)
we noted it on the bottom there—so we could keep record of it.

Q. Other than that, it is in the same condition that it was? A. Yes.

Q. Now, I hand you a check dated November 28, 1950, and ask you to state if you know what that is?

A. Yes, that goes with this bill here—it is paid.

Q. And is that a check paying that particular bill?

A. It is paying a portion—of the 30% of the garage contract that we got from Mr. Gothberg.

Q. Well, is that check in payment of the statement there? A. Yes.

Court: Are the amounts the same?

Mr. Carr: Yes,—$11,535.00.

Mr. Bell: We now offer the two and will ask that they be pinned together and kept together for the convenience of the attorneys and the jury. We offer the statement and the check in evidence.

Mr. Arnell: No objection.

Court: Without objection, they are admitted as one exhibit. They may be stapled together and marked Defendant's Exhibit F and may be read to the jury.

Mr. Bell then read Defendant's Exhibit F to the jury.

Q. Do you know, Mr. Carr, whether there was one check issued and Mr. Gothberg lost it or something of that kind? [146]

A. That is right. We give it to Mr. Gothberg

(Testimony of Burton E. Carr.)

and he lost the check—so he asked for another check—so we give him another check.

Q. Have you ever seen the last check yet?

A. No, I haven't.

Q. That was cashed through the First National Bank?

A. I don't know where it was cashed at—but the First National Bank is where the check was made on.

Q. And it was paid and charged to your account?

A. Oh, yes.

Q. I hand you another statement from Gothberg Construction Company and ask you to state if you know what that is?

A. Well, I am glad I seen that. That is some extra work that we paid Mr. Gothberg on this here sign that he mentioned we hadn't paid him. It's marked paid by check. That is $12,756.07.

Q. Now, after you received that statement, did you cause to be issued your check on the new building account, and deliver it to Mr. Gothberg?

A. We delivered this check to Mr. Gothberg—either he came in after it or we mailed it—I don't remember exactly.

Q. Was it paid through the bank and charged to your account? A. Yes.

Q. Is the check in the same condition that it was, except for the words "paid 1-13/51" on the bottom? [147]

A. Yes, but this sign post is included in this

(Testimony of Burton E. Carr.)
check. I believe it is marked in in another place, too. This is for the sign and all that.

Q. That is one of the issues in the statement?

A. Yes.

Mr. Bell: We offer both the statement and check as one exhibit.

Mr. Arnell: No objection.

Court: Without objection, the papers will be admitted in evidence. The check and the statement may be entered as one exhibit and marked Defendant's Exhibit G, and may be read to the jury.

Mr. Bell then read Defendant's Exhibit G to the jury.

Mr. Kurtz: May I ask what the date of that statement is?

Mr. Bell: The date is 1-1-50, but I am confident that it is Mr. Gothberg's innocent mistake—that it should be January 1st, 1950.

Mr. Arnell: It should be.

Court: I think we will suspend now. Another matter has been set for trial this evening. You may step down, Mr. Carr. Ladies and gentlemen of the jury, the trial will be continued until tomorrow morning at 10:00 o'clock, and you will remember the admonitions of the Court as to your duty. You may retire.

Whereupon at 4:30 o'clock, p.m., September 23, 1952, the trial of the above entitled cause was continued until 10:00 [148] o'clock a.m., September 24, 1952.

Be It Further Remembered, that at 10:00 o'clock,

(Testimony of Burton E. Carr.)

a.m., September 24, 1952, the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: Mr. Carr was testifying when we closed yesterday. He may resume the stand and counsel for defendant may proceed with examination.

Q. Mr. Carr, at the close of court yesterday afternoon, you were examining checks and statements, and I hand you another that has not been handed to you before—and will ask you to state if you know what that is.

A. That is a check—let's see—I'll have to get my glasses. I'm getting old, I guess. That is the check for $10,381.50—that's 90% of the work paid for—90% completion of the work which leaves only 10% left.

Q. Is that statement in the same condition that it was when it was furnished you outside of the——

A. Outside of where we marked it paid—and we have a paid receipt—a check from Mr. Gothberg —signed.

Q. And other than that—the check and receipt are exactly as they were? [149]

A. That's right.

Q. Who gave you the statement?

A. Mr. Gothberg.

(Testimony of Burton E. Carr.)

Q. I notice that Nash Sales and Service is the heading on the statement. Were you the owner of Nash Sales and Service? A. Yes.

Q. Was that the only building that you had building at that time?

A. That is the only one.

Q. The only one that was being built?

A. Yes.

Q. And that is on the same account that Mr. Gothberg has testified about?

A. That's right.

Q. When did he leave the job down there?

A. Well, that would be pretty hard to say. It was—I just don't remember right offhand.

Q. When did you move into the place?

A. We moved in—it wasn't completed when we moved in because we couldn't use the big doors. We moved in there the 15th—we had to move in there because we had no place to go. My lease was expired where I had before—and we had no place to live—so we had to move in there temporarily. He didn't even have doors up on it. [150]

Q. What date was that that you moved in?

A. It was on the 15th—February the 15th—because we took the last load from the place—that is the reason I remember it.

Q. And the work continued on during the remainder of February, to some extent at least?

A. Oh, yes.

Q. Was there some doors to be hung at the time you moved in?

(Testimony of Burton E. Carr.)

A. He didn't even have the big door hung when we moved in there.

Q. But he did hang that soon, did he?

A. Yes. Of course, we had to work it manually. He didn't have the electric on it.

Q. I hand you another check, dated February 24, 1951, and ask you to state if you know what that is?

A. Well, that is made to Anchorage Installation Company for $285.92—on the building. It's Anchorage Installation and they have charged us for it—and there is some extra work that they performed there. I don't know exactly what it was—but my wife—she had power of attorney for signing checks—and the bill was mailed to her. I never could find out—Anchorage Installation wouldn't tell me what it was for—and she already paid the check—and I didn't know it.

Q. Does she have power of attorney to sign your name to checks? [151]

A. Oh, yes.

Q. If her name appears on the checks here——

A. Or on papers—that's all the same.

Q. But the contract wasn't signed by her—she had nothing to do with the agreement in any way?

A. No. This is a building agreement.

Mr. Bell: We now offer in evidence this check.

Mr. Arnell: May I ask him a question, your Honor?

Court: Yes.

(Testimony of Burton E. Carr.)

Cross Examination

Q. (By Mr. Arnell): Mr. Carr, did you say this was for extra work that you ordered?

A. I don't know exactly what it was. We got the bill—and she went ahead and paid it—and she usually always pays bills right when they come in—and she went ahead and paid it and I got it afterwards, but I could never get a statement exactly what that was for from Anchorage Installation.

Q. Do you claim this as an offset against any money you might owe Mr. Gothberg?

A. Yes, that's what I believe it is.

Q. You believe it is—do you know?

A. Well, there's nothing else there that we bought, except on that month there was a tank for our residence—on that one month—and I know the tank was there—but this was [152] another bill. No, I couldn't tell you what that is for. It has something to do with the building—but she went ahead and paid it without me looking at the bills.

Mr. Arnell: If your Honor please, we would object to the proferred exhibit on the grounds that the evidence is not competent. Mr. Carr can't properly identify the work. He doesn't know what it is for, other than it is something in connection with the building. There is no showing as to whose obligation it would be.

Mr. Bell: May I ask a question or two, before you rule on that?

Court: Yes.

(Testimony of Burton E. Carr.)

Redirect Examination

Q. (By Mr. Bell): Mr. Carr, who was Anchorage Installation doing work for around your building there—you or Mr. Gothberg?

A. Mr. Gothberg had the contract—but Anchorage Installation was doing the work—and so I know definitely it is some work. I know it was work on the building but the only thing we bought that month from Anchorage Installation was a hot water tank for our residence.

Q. Was that included in this check?

A. No, it was not included—two separate bills.

Q. Now, did you order them to do any special work around the building for you during that time in any way? [153]

A. Yes, there was some special work that was done—but that was supposed to have been charged to Mr. Gothberg—and then we paid Mr. Gothberg for the extra work.

Q. Was it extra—outside of the contract and specifications—or was it work that was done that Mr. Gothberg contracted and agreed to do?

A. It could be one way or the other—but it is on the building—until we find out definitely what is on—it's on the building—and there wouldn't be that much work that I would authorize that much money for myself because when—I believe it is—you see when they put the—the Anchorage Installation Company—they put all this plumbing in or they started to put it in—and they hooked it up to the main sewer—I mean to the front. I told

(Testimony of Burton E. Carr.)

the men—I said there was no sewer in the front —it's in an alley—and they said it was their contract, and they were doing it, so I just kept out of it because I knew they were doing it wrong. After I told them it was wrong—so after they got all the sewer lines and everything in—then they decided it was the wrong way so they had to tear up all the sewer—all the way through the building —drain and everything—and change it around. I believe that's what that is but it wasn't my fault.

Q. Are you responsible for any of that extra work? A. No. [154]

Q. I notice a little notation on the end of the check that I hadn't noticed before. Would you read that. Maybe that might cast some light on the matter.

A. Well, it's got on here, "Extra work installing air lines and enlarging sewer to washrack"—but that enlarging the sewer and washrack—I know Mr. Gothberg has got that charged to us.

Q. Did you hear him testify yesterday that he furnished and paid for connections to the washrack? A. Yes.

Q. And now that you notice that notation on there—does that refresh your memory as to what it was paid for?

A. Yes, that's what it was—part of this here sewer deal that was changed around—and then on the washrack—we increased the drain and made it larger—and that's what that was for but Mr. Gothberg has us charged for that.

(Testimony of Burton E. Carr.)

Q. And were the drains, as put in by Mr. Gothberg, sufficient to take care of the water from the rack? A. No.

Q. And they had to be increased?

A. That's just that one.

Mr. Bell: Now, we reoffer it in evidence.

Mr. Arnell: May I ask another question, your Honor?

Court: Yes. **[155]**

Recross Examination

Q. (By Mr. Arnell): Mr. Carr, who wrote on this pencil notation—"extra work"?

A. That would only be one person—myself or my wife, but I didn't write it on there—so evidently my wife wrote it on there.

Q. Do you know what was done?

A. I couldn't tell you.

Q. There is also on this check the abbreviation for building, and a question mark. Who put that on?

A. I didn't do that. I know it was on the building—but I don't know what part—it was on the building but it was nothing that we ordered. It wouldn't amount to that much—what we ordered extra.

Q. Do you have a check which you issued in payment of that work you had done on your home?

A. Oh, no, that was a tank that we bought one month—but that was separate from the building.

Q. Did you pay it separately? A. Yes.

(Testimony of Burton E. Carr.)

Q. Do you have the check?

A. No, I don't—if there is any dope on that in there—the only thing I don't know—when I have it home.

Q. Would there be a possibility that the work was included in this work, also?

A. No, because that was separate. [156]

Q. How do you know?

A. Because we always make our checks separately from the building account and the business account. We have two accounts.

Q. Are you able, Mr. Carr, to positively inform the jury what work this check represents payment for?

A. Just what it says on the end of the check. That's the only way.

Q. You don't know when that was put on?

A. I don't remember seeing it on there when she paid the bill—and I think it was put on there afterwards—after the bill was paid—to identify it.

Mr. Arnell: We wish to renew our objection, your Honor.

Court: The objection must be sustained at this time. It may be marked for identification. Is Mrs. Carr in Anchorage so that she can be brought here to testify, if necessary?

Mr. Carr: Yes, she is.

Court: It may be marked for identification at this time and it will not be admitted until we know more about it.

Mr. Bell: Mrs. Carr is not well and I didn't

(Testimony of Burton E. Carr.)

want to put her on the witness stand unless it was necessary. She is not so ill that she is confined to the hospital or anything like that.

Court: Could her deposition be taken?

Mr. Bell: We can bring her here, but I was trying to [157] avoid using her if I could. Maybe the Anchorage Installation people would know.

Mr. Carr: Is there an invoice number on that check?

Mr. Bell: No.

Mr. Carr: Well, I believe it would be the best idea to find out what that check is for from Anchorage Installation. I couldn't find out what it was for when I tried—but maybe Mr. Gothberg can bring the bill for that and see what that's for on that date.

Court: It may be marked for identification as Defendant's Exhibit I, but will not be admitted at this time.

Q. Mr. Carr, I hand you a slip of paper marked "rotary" and ask you to state to the jury if you know what that is?

A. That is a rotary hoist—and when this contract was being made out—I mean for equipment and all——

Mr. Arnell: If your Honor please, we object. I think Mr. Bell should ask questions rather than have the witness volunteer.

Mr. Bell: I asked him what it was.

Mr. Arnell: And he stated—and that does not call for explanation.

(Testimony of Burton E. Carr.)

Court: Another question may be asked.

Q. All right, Mr. Carr, is that picture on the front of that paper the hoist that you put in your garage?

Mr. Arnell: Object to the question, your Honor, upon the [158] ground that it is leading.

Court: That is true, but the objection is overruled. That is the easiest way to get at it. He can say no or yes.

A. Yes, it is.

Q. Now, in the specifications, it was called to our attention yesterday by Mr. Gothberg, that a rotary hoist is one with only one check or plunger. What is a rotary hoist?

A. Rotary is the name of a hoist—and that is one that if the hoist drops down—you can lift one cylinder down—and the other one up. I give him blueprints before we made out the contract and showed him all our equipment to be put in the building.

Q. Did you ever buy for that building any hoist except a two-plunger hoist?

A. No—in fact, I had it already ordered and all the equipment.

Q. Was the hoist already ordered before Mr. *Carr* signed the contract? A. Yes, it was.

Q. You heard the testimony—he had to wait a long time for the hoist. Would you tell the jury what the facts were about that hoist? Did he ever have to wait for it at all?

A. No, he didn't—because I was talking to Mr.

(Testimony of Burton E. Carr.)

Anderson, the architect, Anderson, and I guess—I wanted him to go ahead in the building so that we would be able to get that stuff [159] in there. I told him then, I says "there's $25 a day on that building." "Well," he said, "you can't stick me for that." I said, "Why haven't you got heat in the building?" and he says that it doesn't make any difference for equipment in the building. He knew where it could be picked up—it was *excessible.* It was in Anchorage and he wasn't ready for the hoist because the ground was all frozen—so I told him I would have it down there—that was on a Friday or Saturday—so I had it done Monday morning—and I had it on the frozen ground. It was all frozen solid for two or three feet—and I left it all right there and I told Mr. Gothberg he would have to be responsible for it.

Q. How long did it lay there in the building before it was actually installed?

Q. Quite some time because they had to close the building in first—and after they closed the building in, then the electricians put in plugs—just enough so they could get around. Then they put up a heating plant and got heat in there from the furnace. It was approximately three weeks before the ground was thawed enough to install the hoist.

Q. Did you ever, at any time, tell Mr. Gothberg that that was a one-plunger hoist instead of two?

A. No, I give him a picture of it—and the specifications—before the contract was signed. [160]

(Testimony of Burton E. Carr.)

Q. Do you know what happened to the first set of plans and specifications for the hoist?

A. He had those—Bjornstad & Clark—where I bought the hoist from—I had them wire to Seattle to get another plan—so we could install the hoist—and we got the plans and they were in there in plenty of time before he needed them because the ground wasn't thawed out enough. He didn't have heat in the building.

Q. Did you at all times have your equipment for him ahead of time before he was ready to use it?

A. Oh, yes.

Q. Do you know of any time that you ever in any way did anything, or neglected to do anything, that delayed you in getting into the building?

A. No, I didn't, because I had everything there.

Q. Now, you heard him testify that you told him to waive the using of that wire mesh in the driveway around the pumps or the island around there. Did you ever tell him that—not to use it?

A. I wouldn't be that foolish—not to use it because that's where all the strength is.

Q. Did you ever tell him anything like that?

A. No.

Q. Did you at any time agree to furnish the wire mesh?

A. No, that was in the contract. We had all the stuff [161] furnished that was on the premises—and he was to furnish all the labor and material—it says right in the contract.

(Testimony of Burton E. Carr.)

Q. Did you ever, at any time, orally or in writing, agree to furnish him that wire mesh?

A. Absolutely not.

Q. Did you ever, orally or in writing, waive the necessity of using wire mesh?

A. Absolutely not.

Q. He testified that he put a sack of cement in the mixture that was used around these pumps in lieu of the wire mesh. Did you ever know anything about any such thing?

A. I never heard of anything that foolish.

Court: Just answer the question.

Q. Did you ever hear that mentioned before he testified to it? A. No, I never did.

Q. Mr. Carr, did you tell him to change—what do you call this thing over the beam?

A. Marquee.

Q. Marquee. Did you ever make any changes whatsoever in that marquee yourself?

A. No.

Q. Did you hear him testify about the architect telling him to change that little angle wall back of the marquee, by putting in three cement columns there, instead of cinder blocks? Did you know that that was done by the engineer? [162]

A. Well, yes, in a way. I'll tell you. That was exchanged there. It called there for three doors in the front—and that is the way the building called for—and we had a change there—but I was going to let the building go up as it was—and he let all the blocks freeze and there was like a corkscrew

(Testimony of Burton E. Carr.)

in the top—you could push that in with your fingers. After they set for quite awhile, I told him I wanted them taken out—and he said no—he would take them out in the spring, and I said no, I wanted them taken out now—but you could push them out with your fingers. I said, "As long as you are going to take them out, anyway, put windows in there. We will pay for the windows in the front—" and he took all the blocks down.

Q. Did you ever know what happened to those blocks taken out by him until you heard him testify yesterday that he took them away?

A. He hauled them away.

Q. You knew that? A. Yes.

Q. Did you ever ask this architect, or engineer, as he calls himself, to make any changes, or to give any orders in writing to Mr. Gothberg about changes on that building?

A. I didn't get any notice on the changes except the ones that we changed—the front of the building—and took out the blocks which had to be removed, anyway, and we put in [163] glass in place of it.

Q. Did you know that the engineer had given him any orders to do that in any way?

A. No, I believe that I talked to Mr. Gothberg —I told him how I wanted it done—and I went up to Anderson and told him I wanted this here changed—and I believe that he changed it. That is the way it was changed.

Q. I hand you Plaintiff's Exhibit 7, signed by

(Testimony of Burton E. Carr.)

Mr. Lorn E. Anderson, and ask you to state if you ever saw that letter before it was introduced in court here?

A. Well, I never seen the letter before—but some of those is correct and some of it isn't.

Q. Did you ask Mr. Anderson to write any such letter? A. No, I didn't.

Q. Do you know whether or not you saw Mr. Anderson during the month of December, 1950?

A. No. I'll tell you—this letter—I don't know—I can't figure about that letter on December 28th. Well, it could have been—but it could have been before—I talked with Anderson about some changes which is on here—except there is one here—install overhead door in the back. That was o.k.—that was extra work, and door in the northeast wall—install four-by-six—and this Item B—that was extra work this way. Then he put in these blocks in there and they were all frozen and had to be taken out anyway—and we [164] decided to put a plate glass window, which plate glass window, I believe, was cheaper than the blocks, and Item C, install a two-foot, six-inch by five-foot, six-inch reinforced slab over boiler room. That is not right there. That was in the contract. I can show you that contract where Mr. Gothberg initialed that deal there on the contract—I mean on the blueprints.

Q. As I understand your testimony—installing the slab was not extra?

A. It was part of the floor——

Q. Part of the floor in the garage?

(Testimony of Burton E. Carr.)

A. Yes.

Q. Was there any slab installed there other than the floor in the garage over the boiler room? Was there more than one slab put in?

A. No. That included the contract for the slab over the boiler room—because he initialed that when he signed the contract.

Q. And that is in the specifications?

A. That is in the specifications.

Q. All right, now. Those first two you say are extras?

A. Yes.

Q. What about the rest of them?

A. No. D is correct—that was removing the pumps from the position they were—and moving those over—that was correct. [165]

Q. Who moved those pumps?

A. Mr. Gothberg moved them.

Q. When were they moved—about what date?

A. I couldn't give you exactly what date they were moved, but I will tell you—that's one thing that gripes me right there—is he gives orders to do all this here and that was done. He made this out December 28th. Well, that was done a long after the 28th. That's what I can't understand about this letter—because we were in business and operating after February—and we was pumping gas out of those before we moved them over—and this letter was dated the 28th—giving orders to do this work—and this guy had no idea about me changing pumps because I never seen the man.

(Testimony of Burton E. Carr.)

Q. Did you ever talk to Mr. Anderson about changing the pumps?

A. No, because after I paid him he was gone.

Q. About what date did you pay him, Mr. Carr?

A. Mr. Gothberg said the plans are satisfactory —that's when I paid him then. I don't remember the exact date but I know he completed the plans —and I had Mr. Gothberg look at them—and he come back the next evening and we give him his check because I was unhappy about the amount he charged.

Q. What did he charge?

A. Twenty-Seven Hundred and some odd dollars. Mr. Gothberg figured it would cost me between Six and Seven Hundred Dollars if I would get him.

Q. At whose instance and request did you employ Mr. Anderson? A. Mr. Gothberg's.

Mr. Arnell: I wish to interpose an objection. We went through this yesterday and I think the whole subject matter is immaterial. I didn't object yesterday, but this is purely repetition of it.

Mr. Bell: That last question was, your Honor. I remember I did ask that other question yesterday. I will withdraw that question. The others are proper, I think.

Q. What about the rest of that letter? Check that over and see if there is anything of them that is a proper charge against you.

A. "One plunger hoist shown"—that is not correct—and No. F is "increase the height of all plate glass windows to seven feet"—that is correct.

(Testimony of Burton E. Carr.)

Q. When were the windows changed inside, and when were they put in?

A. Oh, that was changed before they ever got even the front of the building on there.

Q. Was it before that letter was written—prior to the time the letter was written?

A. Oh, yes, that was already in. That's why I can't understand this here—because that had already been changed at that time — because the building was already under construction; in fact, I believe the windows was in about the [167] time that letter was wrote because they had to pour that concrete over the top of the windows—but that wouldn't be any extra charge—in fact, he would be saving money on it by raising them up. It wouldn't be any extra work.

Q. Is there anything else on that letter—that you know of—that was done?

A. I mean the glass would cost a little more, naturally. "G—the northeast wall is to be changed to spandrel construction by pouring three columns in this wall." I don't understand just what that is. I never seen that before.

Q. Mr. Carr, what was the wall originally to be made of—that angle wall in the corner?

A. That was blocks.

Q. Cinder blocks?

A. Cinder blocks, yes.

Q. Now, how long is that wall and how high is it?

A. Let's see. The height of the building, I be-

(Testimony of Burton E. Carr.)

lieve, that's between eighteen and twenty feet—and that length in there—it could be around thirty feet—I wouldn't say exactly.

Q. Now, do you know whether you changed that yourself or was that changed by somebody else?

A. You are talking about the wall—where the glass——

Q. The kind of construction on that wall on that angle.

A. Oh, I changed that myself—for the simple reason I knew these blocks had to come out again—so I decided to put [168] windows in there.

Court: Is there some mention of concrete pillars—are they mentioned in that item? There was some testimony yesterday about pillars.

Mr. Carr: I am getting kind of mixed up about my directions—now, northeast wall—that is the wall that goes on an angle, you mean?

Q. Yes.

A. That is the wall I had reference to—that the blocks were all frozen and loose—and you could poke them out by your hands—and they was all wavey—and he moved the blocks and we put in plate glass windows—seven feet. There had to be a concrete form poured over that to hold up the windows. That would be part of the extra work.

Court: It mentions three columns. What does that mean—do you know?

Mr. Carr: No.

Mr. Bell: Those are poured concrete, your Honor, reinforced.

(Testimony of Burton E. Carr.)

Court: I am asking the witness if he ordered it, or knows anything about it.

Q. Did you order those columns put in there at all?

A. I ordered that part of the work done—but if the columns was needed to hold up the building to protect the glass—it would have to be in there, yes. [169]

Q. Did you know they were going to pour three columns? Did you tell them to pour three columns in there?

A. No, but that cement in that one place where the building is cracked—all the way through there is a big slab of wood in there that caused that whole side to break. I didn't contract for the slab of wood put in the concrete.

Q. Well, did you know that Mr. Gothberg was going to pour those three columns in lieu of cinder blocks that he was using?

A. Would you ask that question again?

Q. Did you know—when you talked to Mr. Gothberg about changing this frozen wall to put in glass instead of the blocks—did you know then that they were going to pour some concrete pillars in there? A. No, I didn't know.

Q. And from your experience in the building there, and seeing what went on, was it just as cheap to pour the concrete as it was to lay the cinder blocks and furnish them?

A. Well, I don't think there would be much difference in the price—because cinder blocks cost

(Testimony of Burton E. Carr.)

so much and the labor—and you could take this plate glass and put it right up in place. I think probably one would offset the other. Probably a difference of dollars and cents—but it wouldn't be too much difference.

Q. Now, you heard him say that the floor in the garage was out [170] of level and that you complained about it, and he leveled it by pouring some skimcoat or something over it. What do you know about that? Did you see anything like that?

A. Yes, there was about two inches—instead of the skimcoat—and he said he poured that—he put in about two inches of concrete over the other—and they just kind of humped it up—it was bad—there was just a couple of them.

Q. Did he fix two of the big depressions?

A. Yes.

Q. And what is the condition of other depressions in your concrete floor?

A. You are talking about the shop now?

Q. Yes, the shop.

A. It is very uneven when it is raining. The water seems to go every place except down the drain. It will drain a certain amount if it happens to be fairly close—and then there are dips of water. The fellows have to take brooms and sweep because it is all over.

Q. How many drains were installed in the floor?

A. I don't remember just exactly. Let's see—about six of seven, I believe.

Q. What kind of caps were put over them?

(Testimony of Burton E. Carr.)

A. Well, I squawked about these caps when they put them on. I said they don't look like very good manufactured articles and he said they were built special. "We made those special [171] for you"—that's what Anchorage Installation told me and I told Mr. Gothberg they wouldn't hold up—so in just a few days a car happened to roll over one and it broke off. Finally some more of them broke off so we made them in the shop ourselves—and we cut holes and drilled them so the water could go down.

Q. What kind of plates did you put over them when the plates broke down?

A. Quarter inch pipe. The ones that was on there—you could break off with your fingers.

Q. Did all of those break down?

A. Yes. But they wasn't exactly the ones he showed me he was going to put on when I went over to Anchorage Installation—the ones he told me he was putting on had quite a large space for the door to the trap—but when those were installed I never noticed until that one bent that way. The door went right down into the sewer—the ones he showed me were constructed different.

Q. Do you remember how much it cost you to fix those drains?

A. I believe it was around $30—Thirty and some odd dollars—I don't remember exactly now.

Q. Do you have a credit amount in the notice that you served on Mr. Gothberg?

(Testimony of Burton E. Carr.)

A. Yes. We fixed them ourselves but that was our cost price on them. [172]

Q. Did you have these men that fixed that for you on your payroll at the time working for you?

A. Yes.

Q. What about this garage floor in the winter time—when there is snow on the cars that are worked on in there. What does it do?

A. It's just all over the floors. The fellows can't even work unless they have a broom in one hand and creepers in there—pushing the water out to dispose of it. We usually have to push it across the washrack—and there on the washrack side so it will drain.

Q. Will it be necessary to put in a new floor in the garage before it can become a practicable garage? A. It would have to be.

Q. How long have you been in the garage business, Mr. Carr?

A. Oh, let's see—I was in Seward—I started there in Seward in '32 to the present time—up to March. That is, I was in the business in Port Angeles, and in Bremerton, Washington.

Q. Have you been in the garage business, then, for a long number of years?

A. Many years, yes.

Q. Is it practical to try to operate in a place with water standing all over the floor, where your mechanics have to work? [173]

A. No, it isn't practical—that's one thing I wanted—I wanted a good, nice floor so it would be

(Testimony of Burton E. Carr.)

something I could be proud of—so when a car was run in there in the winter time—the water would go down instead of wading around in mud like places I have been in in the last few years.

Q. Were you present when they were laying this concrete floor?

A. Yes, I was.

Q. Did they use anything to get it level and properly drained?

A. Well, this fellow that was fixing it—I noticed when he was getting something leveled off with two-by-fours—and he would use that as a straight edge—that is how the floor is laid.

Q. He didn't use a level or an instrument to keep it level?

A. No, there wasn't anything used while he was leveling the concrete.

Q. Now, he attempts to charge you $500 for a beam up in front of the building that he put in there. Did you authorize him to change that in any way?

A. No. He initialed that plan—and it says the beam in there just as planned—and it would show another piece of lumber. It shows all the lumber in the beam—and the steel work and everything—it's very plain and anybody would understand that—why, it's part of the building that he put up.

Court: I think before we take up that subject we will [174] have a recess. You may step down. Ladies and gentlemen of the jury, during the recess you will remember the admonition of the court as to

(Testimony of Burton E. Carr.)

duty. The court will now stand in recess for 10 minutes.

Thereupon, the court, at 10:58 o'clock, a.m., recessed until 11:10 o'clock, a.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present. Counsel may proceed with examination of the witness, Mr. Carr.

Q. Mr. Carr, I have on the easel in front of you, here, the plans that were introduced by the plaintiff, and especially call your attention to one that is BCG 8—and ask you to state if you know, and point out with the pointer, where that $500 beam shows in the plans?

A. I can point out here on this plan where it is —but that's another plan—the identical same plans. Right here. This is a part of it right through here. It goes right through here and that is the end. When you come down to the garage you can see it—it's part of the building. It is not part of the other steel structure at all because this comes down through here—and this was made. This is steel that Mr. Gothberg had to furnish—and they furnished everything else on this plan. There is no reason why he shouldn's furnish the steel because the steel is on there—just like the doors [175] or any other part.

Q. Would you please point—on the big plan here—where that big beam went through?

A. It passes through here—and it went down right through here.

(Testimony of Burton E. Carr.)

Q. And that is the plan he had before him at the time he made the bid?

A. Yes, that's right. The way that beam is—it has to be on there—if I can explain a little further —this beam has to be here so when this comes through here it would have to have something. This is a beam here—and this was cut in like this—and the timbers was cut in through here—and those has to be up against here so the marquee would have something to rest on. The marquee would fall on that big piece over the gas pump.

Q. Approximately how long were those timbers, showing through there, from the back side of the marquee to the front side of the marquee, at the longest point, approximately?

A. I would say about 24 feet—they're a pretty good size. It took this beam in there to hold it—and this had nothing to do with the steel I furnished—because it had to be on this marquee. It's part of the marquee—the same as the rest of the boards.

Q. Now, your original steel had nothing whatever in it concerning the marquee in any way?

A. No, it wasn't.

Q. And Mr. Gothberg furnished all the steel and all the building material for building that marquee? A. Oh, yes.

Q. Did you ever agree with him to pay $500 for that beam?

A. Absolutely not—in fact, I didn't know anything about it—I knew it was in the plan but——

(Testimony of Burton E. Carr.)

Q. Did he ever mention or claim at the time he was putting in this steel that that was extra?

A. No, he never did.

A. Mr. Carr, a few moments ago I showed you a check for $285.92, payable to the Anchorage Installation Company, and since that time I have found a bill here, and I am going to show you, and ask you if that is the bill that that particular check paid?

A. This is that check of Two Hundred Eighty-Five, yes, but that did include this here tank that I was telling you that we got for the residence.

Q. How much is the tank for the residence?

A. That was $37.85.

Q. And that check for $285, that you paid that month, did cover the tank out at your home?

A. Right.

Q. Then, as I understand it, from that check —$37 and something, is your own personal obligation? [177] A. Yes, that's right.

Q. And the rest of it went to the building?

A. Yes, the rest of it went to the building—but I don't understand this—it says extra work for relocating of water line in the building—but there was no extra work for relocating the water line in the front because I didn't change any of that part.

Q. But it was paid for working on that building?

A. Yes, in fact I wouldn't have paid that bill if I had seen it before my wife wrote out the check for it.

(Testimony of Burton E. Carr.)

Q. Then, as I understand, all of that check now —am I right—was paid out for work on the building, except the $37.85 for your home?

A. Yes.

Q. Will you please tell us what the amount of the part was that was applied on the building?

A. The amount of the part that was applied on the building was $248.07—and here's the bill. Let's see—this is the bill from Anchorage Installation Company.

Mr. Bell: We now offer the bills in evidence and also reoffer the check in evidence.

Mr. Arnell: We renew our objection, your Honor.

Court: Let me ask a question. Mr. Carr, is it your claim that this amount of $248.07 the difference between the total check and the amount of $285.92? It is your claim that [178] this represents work done by Anchorage Installation that was covered by the contract, and that Mr. Gothberg was obliged to do under his contract?

Mr. Carr: Yes.

Mr. Arnell: If your Honor please, the witness has already testified in response to direct questions by Mr. Bell that he didn't know what the work was for—and I still think that he doesn't know and the point of the Court's questions, I think, calls for an opinion which he is willing to express and already has. His contention is not the basis of our objection, your Honor. There is no proper foundation, no identification of the work, as being within the scope of the contract.

(Testimony of Burton E. Carr.)

Mr. Carr: Well, the work—it says the water lines—but that was Mr. Gothberg's contract—that water pipe and all that stuff was in the contract of the building.

Q. Where did you get these bills?

A. They mailed them to us—my wife paid the bills, as I say, I wouldn't have o.k.ed that one because that would have been Mr. Gothberg's.

Court: These bills—when your counsel first inquired about the check—you didn't have any of the bills, with you?

Mr. Carr: No.

Court: They were since secured in your files?

Mr. Carr: We found them in the files. I didn't know where they were. [179]

Q. Are you sure that the check was given in payment of these bills—that is $37.85——

A. Yes, we have another paper there. I believe I seen where the two of them was added together. You have it there.

Court: $37.85 for one storage standard range boiler—and then the other bill is New Nash Garage. Do you know why these bills were not charged to Mr. Gothberg? Why would you be charged for them? They were working for him, weren't they?

Mr. Carr: Yes, that's right. There was an error in their office down there for that particular one. They sent it to us and my wife paid the bills—so she just happened to pay it—but I usually o.k. the bills that came through—but that was paid befor I o.k.ed it.

(Testimony of Burton E. Carr.)

Court: I don't want to shut out any evidence that——

Mr. Carr: It says New Nash Garage in there —in writing.

Court: I think if there is anybody at Anchorage Installation that knows about this, before the case closes, he ought to be called in. The objection will be overruled and the check and accompanying papers may be admitted, although there may be some doubt as to sufficient identification. It may go in as one exhibit and they will go in as Exhibit I. That will be the check and the statements of account.

Q. Mr. Carr, in the contract and specifications, it is provided and was admitted by Mr. Gothberg yesterday that he was to furnish a compliance bond. Did you ever waive his [180] furnishing that?

A. No, I never did.

Q. Did you ever agree that he could go by without filing it? A. No, I didn't.

Q. Do you know what the purpose of the compliance bond is?

A. Yes, I do—that is the reason.

Mr. Arnell: If your Honor please, we object to this line of questioning. It calls for conclusions of the witness.

Court: Maybe he knows—he is an experienced man. Overruled. If you know, you may tell.

A. Well, when they are building a building and take a contract—if you take a contract on the building—and if we have paid Mr. Gothberg in full for

(Testimony of Burton E. Carr.)

his building—and he never paid any of his subcontractors—they could make me pay all those. They could make me pay the bill. That is the reason they have a bond—so the bonding company is liable for those bills not paid. It is a very important thing; in fact, I never make a contract without one put in.

Q. Did you ever talk to him in any way, indicating that you would waive his compliance with that?

A. No, he mentioned that he didn't want to at one time. I told him absolutely not—he would have to have it—and he said he wasn't making any money on the building—and I told him no—I wouldn't waive it.

Q. Then you understood and knew that all subcontractors or [181] laborers could file a lien on your building up to ninety days after work was all finished? A. Yes.

Q. Now, No. 2 in this demand states that plaintiff failed to hook up the lights on the 7600 pump. Would you please tell the jury what he failed to do there—in your own words.

A. There wasn't any wire dropped to the beam for the lights—so you can see when you are pumping the gas—and that one light was out all the time. I asked him a number of times about it—and he said it was up to the electrician. I would call them and they wouldn't bother to come down and do it—they never went down until we sold out and had these boys down there and do it.

(Testimony of Burton E. Carr.)

Q. After you sold the building, it was done later?

A. They had it done down there after the building was sold.

Court: Who had it done?

Mr. Carr: Mr. Akers and Mr. Johnson.

Court: The purchasers?

Mr. Carr: The purchasers.

Q. In dealing with the purchasers, were you required or did you guarantee to put this building up in proper condition?

A. That's right. In the contract there was certain items that wasn't completed—and that we were to complete it up to a satisfactory way—it is supposed to be——

Q. Now, then, No. 3 is: "Failed to install one globe and [182] window light on marquee." Tell us about that.

A. Weil, that never was installed. The light globe is just a small item that could be put in—but I never checked it. There never was any wires going to it—but there was some reason why the globe was never put in—and this window glass that goes on the outside part of the light on the ceiling—that was never put in—but I don't believe even the wires was put in up to it. I believe that's why it was left out.

Q. You say he failed to install front window glass that would fit the opening made by the plaintiff, and did cause to be installed a glass that is too small? Will you explain that to the jury.

(Testimony of Burton E. Carr.)

A. That is a plate glass window—one of the large windows in the front—and when they put that up there—when you see it you will see. It is a pretty terrible job—and the bottom is shoved up so it holds on about one-eighth of an inch on the bottom part of the glass top, someway. In fact, when the glass drops down below you can put your hands in the top of it—it is shoved up to hold it in. If there was a little explosion or blast of a door, I believe the window would fall out in the street.

Q. You did request him to fix that in this notice?

A. Yes, and he said the glass man cut the glass too short. I talked to the glass man and he said all the glass was [183] identical—and that the building gave away on the front on account of his not tying the steel—and settled that front so the first glass fit all right—and the second glass had a little opening in it—and they did a little seaming on that third glass—and it wouldn't fit. The building sank down in front.

Q. Was there a crack in the concrete in that front wall?

A. A very bad crack all the way up—that's where he left this piece of wood in the concrete—also where he connected this foundation that he moved in the front—and cut off part of it—but he didn't connect that part good enough so that gave away—and that let the whole building down.

(Testimony of Burton E. Carr.)

Q. What was the front wall? How deep did he cut that front foundation wall down?

A. It was supposed to be put the same—and it was around about six or seven feet—and he put three feet down. I asked him about it and he said it was just as good a footing—three feet—as it would be seven or ten feet.

Q. That makes me think. Did you get a piece of mortar down there off those blocks? Did you bring one here to the Court with you?

A. Yes, I did.

Q. Do you have it there?

A. I will show you. This mortar here is one piece of it—[184] there, you can see here. It disintegrates—breaks up. It calls for sand and cement on there—and they put some kind of a white stuff in there—and you can just scrape it off with your fingers from the blocks.

Q. Did you get that yesterday at the place?

A. Yes, I got it yesterday—I broke it off—it broke very easily with my finger—it just breaks up in my fingers.

Q. That is the ordinary and regular mortar that he has left between the cinder blocks?

A. Yes, in fact some of the blocks upstairs—well, you can see that very easily—going into the show room upstairs there—back of the counter—you can see where the blocks are loose—and if you grab hold of it it breaks right off and you can see all through all those blocks in through there.

Q. Mr. Carr, is that anywhere's near the stove

(Testimony of Burton E. Carr.)

he claimed you had in the building, trying to warm it up.

A. That was fifty feet from the stove. That stuff was frozen when he put it in.

Q. Now, No. 5 in your demand to him to comply with the contract stated: "Failed to install a proper shutoff valve below the concrete in front of the building to prevent the freezing of the outside hydrant, and did install the hydrant in such a sloppy, incompetent manner, without proper shutoff, so that the same froze on two different [185] occasions, causing damage to parts and requiring labor to the extent of more than $20 to make repairs, and still there is no shutoff below the pavement in the proper position as meets the requirements and the ordinances of the City of Anchorage." Now, would you please explain what this No. 5 request was?

A. Well, there is a water line that goes out from the inside of the building—it goes out to the front of the marquee where people get water—and there should be a shutoff valve in the winter—you can't use the water in the winter time—shut it off in the floor so it won't freeze outside. There is no shutoff valve put there—but the valve is put up above in the block. I said at the time that that won't hold and he said it will be all right—he would guarantee it—it would never freeze inside the building, but it did freeze and broke the valve and we had to put a new valve in—and the next time it broke we had to take the valve out altogether and wrap all that heavy insulation around there this

(Testimony of Burton E. Carr.)

last spring—when the thaw came—so I don't know what it will do this next winter. We didn't use it this year at all.

Q. You haven't used it this year? A. No.

Q. Did you make an expenditure of approximately $20 for fixing that? [186] A. Yes.

Q. And would you say that $20 was a reasonable charge for doing the work they did?

A. Very reasonable. All of our work that we do in the shop that way—we always do it at cost—so in our tax we can put our cost, labor and repairs.

Q. Now, this $500—No. 6—that I just asked you about—this $500 that he attempted to collect as a special charge for this steel beam—do you owe him that, or any part of it?

A. Absolutely not.

Mr. Arnell: May I interpose an objection here? Upon my recollection, we went through most of these yesterday.

Mr. Bell: Then you got up and made a big fuss about my not reasking him about that beam—because we had gone through it so I wanted to do it.

Court: I think it was inquired about—however, the answer may stand.

Q. Now, No. 7 in your demand was that he failed to finish and install outlet plates on electrical contacts. Now, did you ever tell him that you didn't want him to put those on—that you wanted to put those on yourself?

A. I didn't tell him I wanted to put them on

(Testimony of Burton E. Carr.)

myself—but I told him that I wanted to finish the walls—and I didn't want them on right at that time—but the electrician was still working in there and they hadn't finished—so I [187] had a painter come in and finish the walls—and the next morning I said O.K.—to put those on, but they never put them on. We have called them up about it—and when he left he said, "I am in a hurry now"—and he said there were only three or four plates—and that was not enough anyway—and the electrician would get the other plates and he would put them all on at the same time—but they have never been put on. We put a few of them on—but the ones on top—we didn't have the labor and they were never put on.

Q. All that was put on, your own employees put on? A. Yes.

Q. Now, Article 8: "Failed to furnish solid brass cylinder locks on the front doors." Do your specifications call for that?

A. Yes, they called for solid brass locks—regular store front—that anybody would see in any store front.

Q. Now, did you buy those locks yourself?

A. Yes. Mr. Gothberg said there wasn't any available—and he put regular bathroom locks or backdoor locks—you can break a window from the outside and push a little button and walk in. I examined them very closely—and they were brass—just brass—washed on outside over a cheap lock—so he would just put them on temporarily, he

(Testimony of Burton E. Carr.)

said, because he couldn't buy what he wanted—and I asked him why he [188] put those big holes in there—I said, "There is some in town"—and he said, "If there's any in town you go ahead and buy them and I will pay for them and put them on." So I went over to the hardware store and asked if they had them and he said sure—so I bought them —I paid $45 for them—so he installed them.

Q. Did he ever pay you the $45? A. No.

Q. Did he ever give you any credit for the $45?

A. No.

Q. What did that do to the doors—cutting those different holes?

A. Well, the doors is weak—the door was thin in the first place—and by the time this big hole—about that big—was in the door—then they cut the hole this way. A good push by somebody's foot and I imagine the whole thing would break out.

Q. No. 9: "He failed to install push plates and kick plates on five doors as per contract." Now, would you tell the jury about those kick plates and push plates?

A. After talking to him a dozen times about those, he finally put part of them on.

Q. What part did he put on?

A. He just put on the two front doors—he just put the kick plates—and let's see—I think just kick plates. I don't [189] remember, and, let's see, I think just these plates was put on—I don't remember seeing any push plates.

Q. What about the other doors?

(Testimony of Burton E. Carr.)

A. Nothing was put on the others.

Q. There is only one push plate on the front door and the kick plates are not on?

A. On two front doors.

Q. And the three other doors have none on?

A. They are supposed to be on all doors—the men's room and the ladies' room—and the swinging door that goes into the show room—and those other two doors opposite the third door—we eliminated in the contract, which no credit was given on that.

Q. And he didn't put them on? A. No.

Q. I see. Now, he testified that all those doors was extra—that they don't show in the plans and specifications. Did those doors show in the plans and specifications?

A. It shows in the specifications, yes, and it tells what kind of hardware that goes on—and how they should swing—double swing door.

Q. Did he ever put the double swing door in?

A. No.

Q. Has it ever been put in up to this time?

A. No, he put a very cheap door—a one way door—and the others [190] it isn't according to specifications—in fact, he had carpenters down two or three times shimming them—and now, every so often, you can't open or close them.

Q. It says in No. 10: "Failed to furnish, install and equip two-way swing doors between the show room and shop as provided in the contract." Was that provided for in the contract and specifications —the two-way swing door?

(Testimony of Burton E. Carr.)

A. Yes, that is the one we were just talking about.

Q. Is that very necessary in a garage operation like yours?

A. Oh, yes, because there is a lot of traffic goes through there—you know—and you work one way and the other way—and they've got to have something through there—it is swinging all day long.

Q. No. 11: "Failed to finish the installation of one heating unit with motor." Would you explain that to the jury?

A. Well, this heating unit didn't have a fan on there—either it was there or was taken off. Anyway, it never was on there. So they did install it at one time—but it shows on the contract if you do something unknowingly—that's wrong—why, the contractor has to pull it out at his own expense and put it in right—but they installed it knowing that this section line was coming through there—for the place between the showroom and the shop—and so they took it down—but they were supposed to move it over just a foot and they didn't install it—and they said they was [191] going to do it but never did.

Q. Is there any motor in that thing?

A. No, they never did furnish a motor.

Q. And they never did reinstall it?

A. No, it's lying down in the basement.

Q. It is your contention that when they installed it in the first place, it was in the wrong spot—and when he put his own partition through,

(Testimony of Burton E. Carr.)

he had to take it down—and just didn't reinstall it. Is that right?

A. The partition was changed—as Mr. Gothberg said we changed it from where it is supposed to go to give the showroom a little more space. We moved it three or four feet. It was supposed to go in that one spot—and it couldn't go in. All they would have to do is put an elbow and push it around—and we could still have used it where it was by raising it up. It was a matter of just about a half an hour's installation on it—and it would have taken no more time on it—but they just took it off and left it off. They could have saved time by twisting the pipes around without changing it.

Q. Now, No. 12: "Failed to install three thermostats in the showroom, as provided for in the contract and specifications." Did he ever do that?

A. No, he never did.

Q. How many thermostats were installed? [192]

A. There was one, I believe, or two—no, there was one, I believe.

Q. One in the showroom and one in the garage?

A. Two in the garage—and on those thermostats—this contractor that he had—I asked him about those thermostats and he said, "Well," he said, "I tell you," he said, "it don't call thermostats for there." I said that I asked for them—I don't know why it shouldn't call for them—and he said no, he read it carefully. He said, "You should be pretty lucky you are getting better units and more expensive units so you can get into the building so

(Testimony of Burton E. Carr.)

we are giving you those units so you will be able to move into your building sooner."—so he said, "It don't call for that but we are giving you better units." I thought I will check that over so I went up and checked the heater that was in there and the name of them—and what they called for—and that was the one we called for was in there and so I asked him about the thermostats—and he said there was no way of making them work. I said, "If you could put one thermostat in and hook it up, you should be able to hook up the rest of them,"—and so he wouldn't put in the rest of the thermostats.

Q. What effect does that have on your showroom?

A. The effect it has—we got four big heaters in there—and it drops down to 60 degrees—then the door opens and that [193] thermostat worked like this—all those four big heaters heat and before it gets down it is so hot and then it is so cold—either so cold or so hot—you can't stand it. We have to set it at a minimum to keep from catching cold—and we had to put electric heaters in both of the offices.

Q. In other words, I understand that thermostats scattered around in the building controls the heat all over the building, while one thermostat would work solely upon the heat at that particular point? A. Yes.

Q. He never did put those in? A. No.

Q. No. 13: "Failed to install two additional

(Testimony of Burton E. Carr.)

thermostats in the shop." Would you please explain that one to the jury?

A. That is the same deal—it gets hot—but the one they installed in the shop—they installed it right underneath one of the heaters and naturally in the cold weather that heats the building—and the shop sits cold, mostly because it keeps shutting off. We have to put asbestos around that one, and try to cover it up so the heat won't heat it—it shouldn't be underneath there at all.

Q. Did they ever install the other two thermostats provided for? A. No, they never would.

Q. Now, No. 14: "Failed to mount and install door frames in [194] lead, according to the terms of the contract." Did he ever do that?

A. All the doors there are supposed to be white lead. When they set those jambs in there between that lock work—it wasn't put in there—and in the winter time the wind blows—you put your hand there and there is air blowing through all the time.

Q. You heard him testify yesterday that he did set those casings in lead. Have you examined those to see whether that statement is true or not?

A. Yes. I saw that when they were put in there—I mentioned about it and there was no lead put on there at all.

Q. Or at any other time? A. No.

Q. Now, No. 15: "Failed to finish the building on the outside and allowed projecting wires to extend, and has left the wall rough and uneven." Would you please describe that to the jury?

(Testimony of Burton E. Carr.)

A. Well, I talked to Gothberg a number of times on that and he sent down a man to do that work —so what he did—he mixed up some concrete and took his hands and threw it on with his hands—then he takes the sack and wipes it all off and I says, "What are you doing there—that's supposed to be a smooth surface." And he said, "I am working for Gothberg—he is paying my check and that is the way he told [195] me to do it." That's sacking and refinishing—throws it on with his hand and rubs it off—that's what he calls refinishing.

Q. How long did he work at that?

A. He worked in the front. He put a ladder on the side and broke my neon light, which I had to pay for. Oh, he fooled around there—I guess about a day or so—just wasting his time on the whole thing. I mean, it looked worse when he got through because he wiped his all off again, on the fronts, but on the side of the building and on the back—none of the outside work has been smoothed off and fixed the way it should have.

Q. Do you know how that work should be done to make it smooth?

A. All that overlapping of the concrete out there should be smoothed off and troweled over so it won't show board marks.

Q. What about those wires that are projecting —or rods?

A. Those should be cut off.

Q. Now, on the inside of the building, what did he do about the main building on the inside there

(Testimony of Burton E. Carr.)

—finishing it up in a workmanlike manner on the inside of the building—the walls?

A. No, that was never finished—it doesn't include finish carpentry—but the walls are rough on the inside. It don't look good at all. [196]

Court: Are the walls all covered?

Mr. Carr: No.

Court: Are they exposed on the inside?

Mr. Carr: Yes, they are exposed.

Court: No insulation on them?

Mr. Carr: No insulation at the top of the ceiling—but it wasn't supposed to be insulation, according to the contract.

Court: We may as well recess right now. Ladies and gentlemen of the jury, you will remember the admonitions of the Court as to duty. The trial will be continued until 2:00 o'clock and the Court will stand in recess until that time.

Whereupon at 11:58 o'clock a.m., the trial of the above entitled cause was continued until 2:00 o'clock p.m.

Be It Further Remembered, That at 2:00 o'clock p.m., the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: The witness, Mr. Carr, may resume the

stand. Counsel for defendant may proceed with examination.

Mr. Bell: Your Honor, if counsel for plaintiff does not object, I have a witness here that's very busy on the job, and [197] it will just be a moment, and if I can use him I would appreciate it very much.

Mr. Arnell: I have no objection to that, your Honor; however, we expect to call the same witness, and will call him later.

Mr. Bell: Call Mr. Cupples.

Mr. Arnell: We also have a witness we would like to call out of order, your Honor, Mr. Ken Luse, he resides at Big Lake and wants to go back.

Mr. Bell: I will consent to that.

Court: All right.

Whereupon,

ARCHIE M. CUPPLES

was called as a witness on behalf of the defendant, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bell): What business are you in, Mr. Cupples? A. General contracting.

Q. As such, do you handle the laying of concrete blocks or cinder blocks? A. Yes, sir.

Q. Did you lay some blocks for the plaintiff, Mr. Gothberg, on the garage that was being built for Burton E. Carr? A. Right.

Q. Do you remember about the date they were laid? [198]

(Testimony of Archie M. Cupples.)

A. Oh, I believe it was in October—late October —or November of 1949 or 1950.

Q. What was the condition of the weather while you were laying them?

A. It was a little chilly.

Q. Was it pretty cold?

A. Well, it was a little too cold for the work we were doing.

Q. Did you, at that time, request heat for the laying of those blocks?

A. It was the understood agreement that Mr. Gothberg was to cover us and give us heat for the block work when the weather turned cold, where it was necessary to do it.

Q. Did he do that? A. No.

Q. Did you request him to? A. Right.

Q. What was his answer?

A. In fact, the inspectors pulled us off the job. I pulled the crew off and they called and asked me why we had stopped work—and I informed him that the inspectors had instructed us to cease work until there was heat and cover put over us—and Gothberg insisted we go ahead with the work which we did—at his responsibility.

Q. And did the mortar freeze?

A. Well, that's kind of a technical question. I don't know [199] where mortar freezes. I can't answer that.

Q. Did you do as good a job as you could, Mr. Cupples, under the circumstances?

A. That is the usual policy with my company.

(Testimony of Archie M. Cupples.)

Q. And which is the best mortar to use in laying those blocks—the regular sand and cement, or the mixture that heats.

A. No, we use sand and cement and hot lime. And when it gets to the point where the hot lime will freeze, you have to resort to dehydrated lime, which we used on the latter end of the job. There is the dry sack mixture and it is pre-slacked, in which you have the hot lime, but after it is solid and cools, then it will freeze, also. We also added 1% calcium chloride in the mixture, which is to offset freezing.

Q. Did you have to add that other—or quit doing the work?

A. Well, we did both.

Q. You added that as long as it would work, and then you had to quit, did you?

A. Well, yes.

Q. And have you been back to see that job since?

A. Several different times—in fact, we went back the next spring and pulled the chimney down and rebuilt the chimney.

Q. Was the chimney in bad shape?

A. Well, it was necessary to pull it down.

Q. Have you been paid in full for your work there? [200]

A. Up to a certain extent, yes.

Q. Is there some balance that you haven't been paid?

A. No, it was agreed upon—settlement price—

(Testimony of Archie M. Cupples.)

which was a little less than the remaining balance at the time.

Q. How much was the amount that you should have received, and what was the amount you did receive?

A. As I recall, without checking on the books, it was $770 and a few odd cents, and we settled for $700.

Q. And the $70 had never been paid?

A. No, never been paid.

Mr. Bell: You may take the witness.

Cross Examination

Q. (By Mr. Arnell): When did you first start to lay the block there, Mr. Cupples?

A. I couldn't tell you the exact date—we would have to go back into the records.

Q. One of your answers to one of Mr. Bell's questions—you said it was October or November?

A. It may have been into November, but it was pretty chilly weather when we started the job.

Q. How far along were you in your work when the inspectors asked you to discontinue?

A. We had finished all of the solid block wall on the west side of the building, which was the first wall put up— [201] and some of the block work on the south end—and we were about half way up on the east wall when we stopped work.

Q. Now, as you laid the mortar in this weather, did it freeze before you could place it—place the blocks?

(Testimony of Archie M. Cupples.)

A. Usually the principle is to spread mortar for several blocks at a time on the edge of the top across—then you place your block—and it was necessary for us to spread mortar for two blocks instead of six blocks, which slowed the work down and cost us more, because of loss of efficiency in the workmen.

Q. Did the mortar freeze before you could place the block and work the mortar——

A. It even froze on the mortar boards.

Q. That might be true, Mr. Cupples, but as you were laying the blocks, did the mortar freeze before you could place the blocks properly?

A. It froze as we placed the blocks, because the blocks were full of frost and the hot mortar would pull the frost out of the blocks into the mortar and freeze it.

Q. But that occurred after the block was already laid, or it started simultaneously with the laying?

A. I would say with the laying—it has a tendency to freeze almost immediately.

Q. My point is—the mortar didn't freeze so fast that you couldn't place the blocks? [202]

A. Yes, we could only spread mortar for two blocks.

Q. But when you were laying those two blocks, you had time to lay them before the mortar froze, did you not?

A. You could, yes, but it wasn't the proper way, because the mortar would freeze and we would have

(Testimony of Archie M. Cupples.)

to pound the block down into the partically frozen mortar.

Q. Now, you have explained that, after you went on the job the second time, that is, after the shut down—that you used a dehydrated lime, I believe you said?

A. I believe we were even using that before we quit the first time. We used hot lime—the slacked lime that we had—as well as we could, and it would freeze solid every night, and it is impossible to use it when it starts to freeze. You can't break it, or anything, to get it out of the box.

Q. Did you use lime all the time in the laying of the blocks? A. Always.

Q. Even those that were laid at the beginning?

A. Lime mortar mix is more or less of a set way —one part cement and one lime and sand.

Q. Is that what was called for in the specifications?

A. Well, it isn't specifically stated in all specifications, but that is more or less a standard mix, and when it is stated—unless some peculiar characteristic on the job—it would be a standard mix.

Q. Then it is standard to use lime? [203]

A. That's right.

Q. Does it make as firm a mortar as mortar in which lime is not used?

A. No, it doesn't make as hard a mortar as concrete mortar, but it isn't practical to use straight cement mortar because——

Q. This type of mortar, though, has adequate wearing ability, does it not?

(Testimony of Archie M. Cupples.)

A. It is standard for the trade, yes.

Q. Now, did the use of the dehydrated lime with 1% calcium chloride—doesn't it reduce its efficiency as structural material?

A. No, that's part of the secrets of the trade. You might say it's more the efficiency that can be gained in the cost that can be derived from the use of the different type of lime. You have to put a sack of lime to a sack of coment in the dry lime, where you can get by with a shovel of cement of hot lime to a bag of cement. Hot lime goes further and gives you the same results. It's cheaper to use hot lime when possible to do it.

Q. Did you not also use hot water as a mixing ingredient?

A. Yes, it was necessary to use hot water to keep it from freezing. It also has a tendency to hold the mortar a little longer.

Q. Did you have any discussions with Mr. Anderson, the [204] architect?

A. Mr. Anderson was the man that told me to stop the work.

Q. Did you have any discussions, after that time, with Mr. Anderson and Mr. Gothberg, with reference to the results of your work?

A. Not at the same time with the two men.

Q. Did you discuss resumption of the work with Mr. Anderson?

A. Two or three days after we came back on the job, I saw Anderson and told him the circumstances under which we were working.

Q. You did continue with the job?

(Testimony of Archie M. Cupples.)

A. Through to completion, yes.

Q. Did Mr. Anderson raise any objection to that? A. It was taken out of his hands.

Q. What do you mean by that?

A. Well, he was sent in there as an inspector, and yet when Mr. Gothberg told me to go ahead over his objections—well, that was up to Mr. Anderson and Mr. Gothberg to settle that end of it. It left me out of it.

Q. Did Mr. Gothberg say that he would guarantee the building?

A. I wouldn't have gone back without his guaranteeing his responsibility for my work, because it was contrary to my idea to go back and finish the job under the conditions we had been working.

Q. I believe you told Mr. Bell that you had gone out recently [205] and inspected the building?

A. That's right. A few days ago.

Q. Will you state to the jury what kind of block was used?

A. There is two different makes of pumice blocks on the building—one manufactured by Anchorage Sand and Gravel—and the other by Krause. Some of the blocks were already on the job, that I believe Breeden and Smith, the fall before, had set on the job. Those were placed on the west wall of the building because they were rougher textured —and the ones that Mr. Gothberg furnished came from Krause, which was nicer textured block—and that was used on the outside to give the building a little better appearance.

(Testimony of Archie M. Cupples.)

Q. Were all of the blocks used in the building pumice blocks, to the best of your knowledge?

A. I believe so, yes.

Q. Now, from your examination, have you seen defects in the existing walls?

A. There are some cracks in the building at the present time.

Q. Where are those cracks located?

A. Several on the east wall up there, running diagonally off of the corners of the openings, which is a typical spot for cracks to appear.

Q. Now, are there any cracks on the south side?

A. There is a crack about the center of the south end over the concrete lintels that held the south end of the building. [206]

Q. Are there any cracks in the west wall?

A. Not to my knowledge—I didn't examine the west wall.

Q. How about the front wall?

A. I didn't notice any. There may be.

Q. Now, Mr. Cupples, are cracks in these blocks typical to this building, or are they common to pumice block buildings?

A. Pumice block has a tendency to crack through —expansion and contraction. You have a fine example of that in your school building. They not only crack down through mortar joints but it will split one block and go between the joints of the two below or above.

Q. Is that a common characteristic of pumice block? A. Right.

(Testimony of Archie M. Cupples.)

Q. Now, of the cracks that you observed, would you state to the jury, as you remember them, how they run through the course of the wall?

A. Oh, in no particular fashion. Some run off from the corners of the openings in a diagonal fashion, which is a normal tendency of a crack in a block wall. It has a tendency to crack down through the end joint through the bed joint, so it will go diagonally down or up the wall, but often times it will run vertical. It will go down through the end joint of one and split the block in the next one below. [207]

Q. Did the cracks you observed appear to be cracks that would normally appear in that type of construction? A. Pretty much so, yes.

Q. What was the condition of the mortar of the centers that you examined?

A. Surprisingly good.

Q. So far as you could determine, was there any defect in it?

A. Not without a closer examination than I gave the building.

Q. There is no apparent defect is there, Mr. Cupples?

A. Not from just, you might say, a hurried look. I walked around the building inside and out.

Q. Mr. Cupples, were you familiar with this job site before or about the time Mr. Gothberg took the contract to furnish the building?

A. Yes, in fact I bid competitively against Gothberg on the job.

(Testimony of Archie M. Cupples.)

Q. Then you knew of the existing old foundation, did you not? A. Right.

Q. Was that old foundation complete on the east side of the building to which you have referred?

Mr. Bell: Your Honor, if he is using the witness for himself at this time, I have no objection, but that is not proper cross examination, and I object to it unless he makes the witness his own.

Court: I assumed for some time that he has been using [208] the witness as his witness——

Mr. Arnell: Mr. Bell opened up the field by having Mr. Cupples testify generally as to how the mortar was laid, and how the blocks were laid, thereby permitting us to go into the character and the present condition of the building. I have no objection if the Court wants to stop my questioning. I will call Mr. Cupples later.

Court: It might save everybody time if counsel would put in now his own testimony or this witness' testimony any that he wishes in his own behalf. If counsel doesn't care to proceed now, using Mr. Cupples as a witness for the plaintiff, Mr. Cupples may be excused, when counsel has finished his cross examination—and the objection is sustained as to the last question upon the ground that it is not proper cross examination.

Q. Would you prefer to continue, Mr. Cupples, and finish this up now?

A. It would work out better for me—I would much prefer it.

(Testimony of Archie M. Cupples.)

Mr. Arnell: For the record, then, from now on, Mr. Cupples is the plaintiff's witness.

Direct Examination

Q. (By Mr. Arnell): Were you familiar with the job site before this building was commenced, Mr. Cupples? A. Yes. [209]

Q. Had you been out there and personally looked over the existing foundation that was there?

A. There was a few unusual circumstances in the bid because of the fact that Breeden and Smith had done previous work on the job site.

Q. Do you know, of your own knowledge, how deep the original foundation was constructed?

A. I couldn't tell you offhand—no.

Q. Was the east wall, to which a portion of your testimony has referred, installed at the time that you bid on this contract?

A. That is a concrete foundation wall on the east side of the building. There was some changes to be made and the building set back off the street —I believe twelve feet.

Q. Well, now, in answer to one of my questions, Mr. Cupples, you stated that some of the cracks appeared at the corners of the big door. Do you refer to the big door as the one on the east wall of the building—the one on Denali Street?

A. Yes.

Q. Is that door located over the old foundation or the new foundation?

A. I believe that is at the end of the old founda-

(Testimony of Archie M. Cupples.)

tion. I think the new foundation joined right at the side jamb of that door.

Q. In other words, the door itself would be on the old foundation? [210]

A. I believe so, yes.

Court: Does the building face south? Is it on the north side of the street, facing south?

Mr. Cupples: No, it is on the south side of the street facing north.

Court: Oh.

Q. Well, did the cracks that you observed out there, Mr. Cupples, go through the body of the block, as well as the joint between the blocks?

A. In a few places, yes.

Q. Do those cracks run from the foundation up through the top, or do you recall?

A. I don't believe they do—no—they will start at the top of an opening and continue up or down for a few feet, and stop.

Q. I believe you stated that you didn't observe the front of the building?

A. Not too closely, no.

Q. Did you observe any cracks at the front?

A. No, because I pulled in on the side of the building, and I went in through the back door and looked inside of the building—and came back out through the east door, and walked around to the south end of the building, and back up on the east side. [211]

Q. Did you observe any settlement of the front wall?

(Testimony of Archie M. Cupples.)

A. No, I didn't because I didn't look on the front end there.

Q. Are you familiar with the building generally, Mr. Cupples? A. Pretty much so, yes.

Q. In your opinion, as a general contractor, would it be possible for one wall, such as the Fifth Avenue wall, to settle without there being some evidence or damage to other portions of the building?

A. No, it usually carries itself around the corner, where you are tied in on your blocks and your concrete work. It would almost be self evident on the wall there if there had been a change in the footing.

Q. Now, would you describe the condition of the alignment of the blocks that you put in, Mr. Cupples? A. I don't understand you.

Q. Well, perhaps alignment isn't the correct term. What would the contractor call the line that is up and down on the face of the block—I mean the inside or the outside wall?

A. Well, that would be the plumb—if a wall is vertical to a true line—plumb, which is standard specifications to the extent that it is not even specified anymore. It may appear in the general specifications.

Q. Are the existing walls plumb?

A. That is usually the way we put them in.

Q. I understand that, Mr. Cupples, but had there been shifting [212] of those blocks?

A. Not that was visible or noticeable to the eye.

Q. Now, when you refer to the term "plumb,"

(Testimony of Archie M. Cupples.)

you mean that the blocks are properly lined up, one over the other, at the lower horizontal place, end to end, properly to conform to a straight line, do you not?

A. That's right.

Q. Now, to put the question another way, do any of these walls, viewing them in a horizontal position, weave at any point?

A. Not to my knowledge. The usual procedure is to bring up the leads, which are the corners of the building. You bring these up five or six courses, and then you strike a line on which course of blocks, as you bring up around—it is known as the line or the string, in terms of the trade—so it is almost impossible to get off of either a horizontal line or a true line between those two points. If it is an exceptionally long wall, then you would place a block in the center to pick up the slack in your line.

Q. You used the accepted practices with respect to all this particular construction, did you not, Mr. Cupples? A. That's right.

Q. In your inspection of the building, Mr. Cupples, did you have occasion to look at the windows in the rear of the building and see a stove pipe going out through one of [213] them?

A. I did.

Q. Did you also, in your inspection, look at the block above the location of this stove part, and also this stove or heater, or whatever it is?

A. I noticed they were broken above where the stove pipe came through out the window.

(Testimony of Archie M. Cupples.)

Q. Did you stand inside and attempt to look through the blocks above there?

A. No, I didn't. I would have had to have a ladder or something to get up above those windows.

Q. Now, as a man of experience in general construction, Mr. Cupples, would instense heat, carried against a wall like this, cause any contraction or expansion in the blocks or the joints?

A. Your expansion and contraction is caused by heat and cold.

Q. Well, then, if there are cracks in the mortar between any two blocks, or series of blocks, over this area, do you, in your opinion, feel that that probably would be caused by the changes in temperature resulting from the heat that would generate by this heater—and subsequent closing off when it was shut down?

A. You say—any holes through the blocks or mortar joints?

Q. Through the joints—not in the blocks themselves?

A. It would have a certain bearing on it—also the acids from [214] the smoke—if that was oil burning—well, I should say almost any type of fire has a tendency to affect the mortar. You will find that peculiar to chimneys.

Q. Mr. Cupples, do you know what the average water content of an ordinary pumice is at the time it is laid?

A. No, I would say that it wasn't too high be-

(Testimony of Archie M. Cupples.)

cause of the fact that the moisture was more or less frozen out of the blocks.

Q. Are pumice blocks more porous than other blocks so that they absorb more water, or rain, or snow, or general atmospheric conditions?

A. They may be a little more porous, yes, but that is one of the advantages of the pumice block in that it has minute air cells in the construction of the blocks, which gives it its insulative value.

Q. I realize that, Mr. Cupples, but in the texture of the block itself, the pumice being ground up, would there be absorption and moisture there?

A. You mean in the process of manufacturing them?

Q. No—well, possibly in the process of manufacturing, and even after they are laid in place.

A. No, I would say they are about equal to a concrete block in absorption after they have been in the wall for any length of time.

Q. Well, if they were subjected to above average temperatures [215] for any period of time, would there be any permanent shrinkage either in the mortar or in the block itself?

A. Pumice is an inert material. It is of volcanic ash—the pumice we use here—and is absolutely fireproof.

Q. Would the heat, though, cause any shrinkage?

A. I doubt if heat would have any effect on it.

Q. Well, if there were a shrinkage, then, between two blocks that had been laid, would that shrinkage have to occur in the mortar?

(Testimony of Archie M. Cupples.)

A. I believe so.

Q. Would that be an uncommon situation where mortar was subjected to fluctuating from one extreme in temperature to the other?

A. As far as the building wall is concerned, it is a little unusual, yes.

Q. I believe you mentioned, Mr. Cupples, that you had bid competitively against Mr. Gothberg?

A. Right.

Q. Did you bid competitively just on this phase of the building, or did you bid against him, also, on the foundation?

A. No, it was a general contract as made by Mr. Carr and the architects.

Q. You did not, then, bid upon the foundation, as you recall?

A. No, I think that was previous work that was already—yes, that had been placed by Breeden and Smith. [216]

Q. Do you mean, also, the revision work had been placed by Breeden and Smith?

A. I don't recall whether that was completed at that time or not. It seems to me that we were to cut off the front end of the building and add the twelve feet on behind. Now, whether that was on the general contract at that time, I am not too clear.

Q. Did you bid on the relocation or revision of the foundation as distinguished from the building?

A. I don't remember if that was in on that particular general contract or whether that was a sep-

(Testimony of Archie M. Cupples.)

arate deal before the main section of the building came up.

Q. Mr. Cupples, in response to a question by Mr. Bell, I think you stated you had to pull down the chimney in this particular building?

A. That's right. The chimney was cracked up —in bad shape—and the next spring we went in there, on the request of Mr. Gothberg, and we replaced the chimney.

Q. Was the chimney constructed, in the first place, out of the same type of construction material as the wall or walls?

A. I believe the chimney is built from concrete blocks—four inch concrete blocks.

Q. Are those the blocks, Mr. Cupples, that were bad, the size of a brick?

A. No, they are 4 by 8 by 16. [217]

Q. 4 by 8 by 16? Is that what the chimney is constructed of now?

A. Yes, with a flue lining in the interior.

Q. When did you originally install the chimney? Was it considerably later than the other work that you have described?

A. Not too much later, no. It was one of the last things that we did no the job.

Q. In other words, all of the structural portions of the wall had been completed, had they not?

A. Yes.

Q. And the chimney was the last thing that was done?

(Testimony of Archie M. Cupples.)

A. The roof went on, although the glass was not installed in the windows.

Mr. Arnell: That's all.

Mr. Bell: Just a few questions on cross examination.

Cross Examination

Q. (By Mr. Bell): Referring to this chimney, did you use the same mortar in building the chimney that you did in building the walls?

A. Same mortar, same men, same conditions.

Q. Now, when you went back to tear the chimney down, what condition was it in?

A. I don't know—it had cracks in it to the extent that it was necessary to pull it down. It was building up a hazard to the workmen in the shop.

Q. Now, did you notice the mortar between the blocks in that chimney when you tore it down?

A. Yes.

Q. What condition was the mortar in?

A. Well, it was a typical condition between the blocks as you find it in any type of masonry work.

Q. Why did you have to tear it down—the workmanship in putting it up was all right, wasn't it, Mr. Cupples? A. Yes.

Q. What caused you to have to take it down?

A. Because of the fact that it had cracked up during the intervening time—from the time we went in there to tear it down and the time we had built it.

Q. Was freezing responsible for that?

A. I wouldn't know.

(Testimony of Archie M. Cupples.)

Q. Was it built in approximately the same temperature—weather—that the walls were built in?

A. It was a little colder, if anything, a little later in the season. A week or a day or a couple of hours makes a difference in Anchorage, we all know.

Q. It was at least a day later than the walls, was it not? You had finished the walls when you started on the chimney?

A. I would say a week or ten days later.

Q. And the roof was on at that time, was it not? [219]

A. Well, it was on when we finished the walls.

Q. The roof was on when you got the walls done—was that right? A. Right.

Q. When did you go and look at this building, Mr. Cupples, the last time?

A. A couple of days ago.

Q. At whose instance and request did you examine the building? A. Mr. Arnell.

Q. And did you look up over the showroom on the second story, then, inside over the showroom, at the blocks up there? A. No.

Q. You didn't notice to see whether the mortar had frozen out of those blocks, did you?

A. There was no place where I could detect any mortar freezing out of the blocks—no place in the building.

Q. You didn't examine the wall over the showroom, then? A. No.

Q. Did you go upstairs at all?

(Testimony of Archie M. Cupples.)

A. No, not in the showroom or parts section.

Q. Did you go in any part of the showroom?

A. No, not in the front end.

Q. Did your men, or you, lay the blocks in the front wall—the north wall of the building?

A. Yes, over the top of the concrete lintels.

Q. Were they torn out once? [220]

A. It seems to me they were—I'm not quite clear on that point.

Q. Now, the black smoke that you refer to on those blocks—that is only on the back wall, is it not?

A. That's right. A section about six feet wide—I would say—was blackened.

Q. And about how high?

A. It's practically up to the top of the building from where it comes out of the window opening.

Q. In other words, the blackness is from where it goes out there through the window on up?

A. Right.

Q. If there was any heat from that pipe there, that wouldn't have any effect on the rest of the wall beyond the six feet space that you have described, would it?

A. It wouldn't have, no.

Q. That wall is 50 feet long, is it not, the back wall? A. I believe so, yes.

Q. Did you look to see whether you could see light through that wall at various spots?

A. No, because it appeared in pretty good shape, other than the one crack I noticed.

Q. There was a crack up there, was there?

(Testimony of Archie M. Cupples.)

A. A crack appears on the outside of the building.

Q. Does lime make mortar weaker or stronger?

A. I think it would take a chemist to answer that question. [221]

Q. You have had a lot of experience in handling blocks and cement, haven't you, Mr. Cupples?

A. Several years, yes.

Q. Do you think cement and sand makes a stronger mortar when it sets than it does if you add the lime?

A. I would say it is harder—whether it is stronger or not, I couldn't answer.

Q. But it does make it stronger?

A. That's right.

Q. Now, in tearing down that chimney, did you work on the actual work of tearing the chimney down? A. No.

Q. Were you there when it was torn down?

A. Yes.

Q. Did you notice whether or not the blocks were loose, and were just picked up and laid down easily by your men?

A. In a few places—where there was a movement on the chimney—they were loosened on all four sides where we pulled the four different corners down. You could pick a block up off the ones that rested on, and there were other cases we had to break each block against the next block.

Q. In some cases the mortar was still good and held the block, and in other places it was loose?

(Testimony of Archie M. Cupples.)

A. Yes.

Q. Did you state that the chimney—in its condition before you [222] tore it down—became a hazard to the workmen around it?

A. As you would consider a hazard, yes.

Mr. Bell: I think that's all.

Court: That is all. Without objection, the witness will be excused from further attendance.

Mr. Bell: He may be excused as far as I am concerned.

Mr. Arnell: I would like to call Mr. Luse, your Honor.

Court: All right.

Whereupon, Mr. Cupples was excused as a witness and

KENNETH W. LUSE

was called as a witness, on behalf of the plaintiff, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Arnell): Would you state your name, Mr. Luse, please?

A. Kenneth W. Luse.

Q. Were you in the painting and contracting business in January, 1951?

A. Yes.

Q. Do you know Mr. Burton E. Carr personally?

A. Not personally I don't—no.

Q. Do you know where the Nash Sales & Service Garage is? A. Yes.

Q. During the month of December or January

(Testimony of Kenneth W. Luse.)

of 1950 or 1951, did you have occasion to do any work out there?

A. I done that painting for Mr. Gothberg, yes.

Q. Now, you say you did that painting? What painting do you refer to, Mr. Luse?

A. Well, the painting was just the structural steel in there—was all I was required to paint.

Q. Did you discuss the structural steel, that was the subject of your agreement, with Mr. Carr?

A. Yes, I was out there several times on the job.

Q. What was the condition of the steel when you were out there?

A. Well, I didn't notice any unusual condition of it—you mean in regards to paint?

Q. Yes.

A. No, I don't recall if any unusual condition of it.

Q. Was the steel such as a railroad rail was —had it been treated in some way?

A. No, it had a shop coat.

Q. When you refer to shop coat, what do you mean, Mr. Luse?

A. Well, usually when the steel comes, it comes already red leaded—it is called a shop coat. In other words, it is primed at the shop or factory.

Court: Primed with what?

Mr. Luse: Usually the red lead.

Court: All right.

Q. Well, were all of the structural pieces that you saw out there coated with red lead paint?

(Testimony of Kenneth W. Luse.)

A. I couldn't say to that, now—but I know that most of it [224] came shop coated—there might have been a piece that didn't have a shop coat, though, but I didn't pay any attention to it.

Q. Did you have any occasion, Mr. Luse, to do any patch work or repair work to the original lead coat?

A. Well, yes, all the braided places, and the rivets that they are put together with, has to be spotted with red lead prior to your field coats.

Q. To the best of your recollection, were all of the beams and joints painted with red lead by your men? A. Yes.

Q. Did you do any other work on the structural steel out there?

A. We put on two coats of aluminum—two field coats.

Q. What type of aluminum? Would you just elaborate a bit for the jury?

A. Just regular standard aluminum paint.

Mr. Arnell: That's all.

Court: Counsel for defendant may examine.

Cross Examination

Q. (By Mr. Bell): Mr. Luse, at that time you were doing quite an extensive contracting business in Anchorage? weren't you?

A. Right.

Q. About how many men did you have working for you?

A. I don't recall at that particular time how

(Testimony of Kenneth W. Luse.)

many—but the [225] winter months it wouldn't be too many.

Q. Could you give the jury an idea how many you had working from September until December?

A. Oh, I probably only had about six or eight men. That's all I usually carry in the winter time.

Q. Could you tell me who the men were that worked on that job so I will have their names?

A. I couldn't tell you, now, without going over my payroll records to show who worked on that job.

Q. Did you see them working?

A. Yes, sir. Gene Macheney was in charge on the job.

Q. And where is Mr. Macheney?

A. Working around Anchorage now.

Q. Do you know his address?

A. No, but he lives out by Merrill Field someplace.

Q. Now, was he your foreman out there?

A. Right.

Q. You didn't take the time yourself, Mr. Luse, to go along and watch these paint jobs done, did you?

A. Well, yes. I had to watch them right along, but I didn't spend all of my time on one particular job, supervising it—no.

Q. You ran a paint store, too, did you not?

A. I did.

Q. You had quite an extensive paint business in your store at [226] that time, didn't you?

A. Well, I wasn't taking care of that.

(Testimony of Kenneth W. Luse.)

Q. Now, how many times did you go out there to that job? Just try to remember the best you can, Mr. Luse.

A. I usually made all of my jobs, anyway, twice a day.

Q. What time of the day would you normally make that job?

A. I couldn't tell you—at various times—I would just make the rounds.

Q. What painting did you do on that job out there? Did you paint all of the inside of the building, or just part of it?

A. No, I think there was structural steel—and I believe there was a wall room that was painted on the inside.

Q. And is that all you can remember that you had to do there—that is all?

A. My specifications I had, if I recall, came under structural steel.

Q. You didn't put any red lead on the structural steel, you say?

A. Yes, we put read lead on it.

Q. You said that was factory placed there?

A. Yes, it was shop coated—but we had braided places—and all of the sections or joints had to be cleaned and red leaded prior to field coats.

Q. Were you there at any time that part of that work was [227] being done?

A. I probably was but I don't recall any specific instance on it, no.

Q. And, Mr. Luse, you wouldn't remember speci-

(Testimony of Kenneth W. Luse.)

fically just what was done on any particular job two years ago, would you—1950 and 1951?

A. Oh, yes. There are various things that you remember, sure.

Q. But you wouldn't remember all the details, would you?

A. Definitely not—all the details.

Q. Ordinarily, where structural steel is fabricated and put out at a regular shop, they put some kind of a prime coat on it, don't they?

A. Yes, it usually comes shop coated with red lead—that is, your prime coat.

Q. And then you had nothing to do with putting that coat on, of course?

A. Outside of spotting up the places.

Q. I see. Can you tell me anybody else that you can remember, now, that worked on that job, other than Gene Macheney.

A. I don't recall—three or four men but I don't know who they were, now.

Q. Can you remember the time of work they worked there?

A. It was sometime in the latter part of December or January. I don't know—it was in the winter.

Q. Was the building fully enclosed at that time or not? [228] A. Yes, it was.

Q. Was the door and windows in, and everything? A. Yes.

Q. They were all in when that was done?

A. That's right.

(Testimony of Kenneth W. Luse.)

Mr. Bell: That is all.

Mr. Arnell: That's all.

Court: The witness will be excused from further attendance, without objection, and the Court will stand in recess. The jury will remember the admonitions of the Court as to duty and the Court will stand in recess for 10 minutes.

Whereupon the Court recessed from 3:00 o'clock p.m., until 3:10 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present. Now, I think if there is nothing else,

BURTON E. CARR

will resume the stand and counsel for defendant may proceed with examination.

Q. (By Mr. Bell): Mr. Carr, in your testimony this morning, I believe you were asked about when you paid the Alaska Engineering people for the plans and specifications, were you not? Were you asked that this morning?

A. Oh, yes.

Q. I hand you a check and will ask you to look at that check [229] and see if you know what that is for?

A. That is to Smith and Lorn Anderson—architects—a check we paid to them for $2,725.71.

Q. What is the date on it?

A. November 8th.

Q. Is that the check that you referred to this

(Testimony of Burton E. Carr.)

morning as having been given to the architect in payment of his fee? A. Right.

Q. After November 8th, how often did you see him at the site of the work, if ever?

A. One of them I didn't see at all. Evidently he jumped the plane as soon as I give him the check. The only time I had conversations with him was over the telephone—but I believe I saw him one time—it could have been twice.

Q. After November 8th? A. Yes.

Q. Now, Mr. Carr, were you there when the painting was done on the steel work?

A. Yes, I was there because we were moving in the building—and I stayed at the new building—and I took care of where I wanted the equipment set—and the parts bins and all. I was there all the time.

Q. Can you tell the jury how many men were working on the painting?

A. There was around three or four men—I couldn't say exactly— [230] it could have been just three.

Q. About what time of the year was it? About what date was it that they were doing that painting?

A. Oh, that was around—I couldn't say the exact date. It was in February.

Q. Of 1951?

A. Yes, because we were moving in so it must have been right around that time. We were moving in and it took quite awhile to move—we couldn't

(Testimony of Burton E. Carr.)

move in one day. It was quite awhile for us to move everything over—it was quite a job.

Q. Did you ever see any red lead or red paint of any kind used by any of those men?

A. No, I didn't. You see, when all this steel was laying out on the ground for over a year it started in rusting—and the only thing I saw—they had a little broom and were wiping it off—and then they started putting aluminum on so they finally got from one side to the other—I'm not sure whether they completed it all that day, but it seemed to me like at 10:00 o'clock the next day they finished it up—just one coat, that was all that was put on—no red lead spotting—in fact, I made the statement I never seen it before.

Q. Kenneth W. Luse, who testified—did you ever see him before?

A. No, he has probably seen me, being in business, but I am [231] positive I never seen him before.

Q. Now, was there more than one coat of paint put on this steel at any time?

A. Just the one coat.

Q. Did you discuss this matter with the general contractor, Mr. Gothberg, at the time?

A. Yes, I did, but he said it didn't need red lead—I told him the specifications called for one coat of red lead on account of the steel being scuffed—and that's what he was paid for—one coat of red lead and two coats of any paint I wished—that was

(Testimony of Burton E. Carr.)

in the contract and it only received one coat—very thin.

Q. What is the condition of that steel now?

A. Well, I was up there last night when I got through, and went up above the showroom and it started to rust through there. You can take your fingers and see it is rusting there under the other paint. The whole thing will have to be chipped off and painted with red lead—and put the other paint on.

Q. Did you tell Mr. Gothberg that there was only one coat of aluminum that you saw?

A. Yes, and he said he would check with them. I told him I was moving the equipment in and I would like to get the rest of that paint on because the customers were coming in with the cars and I didn't want to foul the place up—and he said [232] he would check and he come back and said—he claimed they put two. I said, "Did you see them put two," and he said, "No, I didn't," and I said I didn't either—that they only put one coat—that's all was on there.

Q. I was questioning you about the various sections of the demand that you had served on Mr. Gothberg, and I will continue now, but before doing it I would like to ask you if you have compared this picture here, on this rotary magazine, with the one that is in your place, and tell the jury whether or not it is the same identical one.

A. It is the same—identical to that.

(Testimony of Burton E. Carr.)

Mr. Bell: We now offer in evidence the picture of the rotary lift.

Court: Is there objection?

Mr. Arnell: We renew our objection, your Honor.

Court: The objection is overruled. This is only for the help of the jury. The witness says this is a true picture of the one put in. It is admitted for that purpose.

Mr. Arnell: I realize that, your Honor. I didn't mean to base my objection on that attempt to deprive the jury of the benefit of this, but the contention is whether this is called for in the plans and specifications. The mere fact that this is a commercially named device called "rotary" does not mean it is within the original plans and specifications.

Court: That is a matter of argument to the jury. This [233] is admitted only as a picture of the lift that was actually put in the place, and it may be admitted and marked Defendant's Exhibit J.

Mr. Bell then read the first page of Defendant's Exhibit J to the jury.

Q. Now, in your demand of the plaintiff to comply with the terms of the contract, Section 16 states: "Failed to finish the building on the inside in a workmanlike manner." Would you tell the jury what you mean by that—as to the walls, and floors, and everything?

A. Well, the floors are all uneven and have to be removed to be satisfactory—and the walls—the wires in inside isn't finished on the walls—and the ladies' and men's rest rooms calls for finished car-

(Testimony of Burton E. Carr.)

pentry work—and Mr. Gothberg didn't want to put the finish on in the ladies' side. He wanted to leave the wall as it was—it was an ugly block wall and he said it would be extra if he put plyboard over there. I said, "I don't want to leave it the way it is—I want it finished," and he said, "I will have to charge you extra,"—and I said, "Go ahead and put it in."

Q. Did you ever get him to do anything except put that one piece of plywood on?

A. Yes—and you can see in the ladies' restroom —in the right hand corner—there is a piece of this mud that way, lying down on the ground. It was frozen in on the ground and it [234] was laying up against the side. Instead of taking a trowel and getting that mud out—I told Mr. Gothberg to go around and saw a hole—so they had only to push their finger in there and push it out so this beam would fit in there.

Q. That is the way it is now?

A. Yes, on the lower part of the beam—it is cut out for this piece of mud that they pushed out with their fingers.

Q. And is it that way now—in the ladies' restroom? A. Yes.

Q. So that the jury may see it, if they go there, to inspect it? A. Yes.

Q. Now, No. 17: "Installed and laid cement block in freezing weather without properly protecting the wall, and allowed the mortar between the blocks to become frozen, and the wall is dangerous and

(Testimony of Burton E. Carr.)

apt to disintegrate." Now, there has been so much testimony about that I won't ask you much, but I will ask you to state if there has ever been repair or anything done to it by Mr. Gothberg, since you served this notice on him?

A. None of that has been repaired. Of course, he did repair the chimney, but the City got after me on it—so the City made me tear down the chimney because the blocks—you could pick them out with your hands. They were loose and so the [235] fellows wouldn't work around this chimney at all because it really was dangerous.

Q. And the city inspectors caused that to be done?

A. Yes, so I told Gothberg he had to remove it and he said it would be all right in the spring of the year—he would guarantee the chimney—and I said if somebody got killed I would be stuck. It was in a wavy condition when they cut a hole for the chimney—they didn't cut the hole square so they had to bring their block this way and twist it to go up.

Q. In fact, it is not cut perfectly plumb—the new one?

A. The rest of the blocks, on a lot of occasions, are the same way now. They are all loose all the way around where they were frozen and didn't adhere—some did and some didn't.

Q. The same amount of mud was used in the chimney in laying it up as was used in the walls?

A. Yes, the same thing.

(Testimony of Burton E. Carr.)

Q. Then, as I understand it, there has been nothing done to correct this wall?

A. No, nothing.

Q. Now, No. 18: "Failed to insulate the water pipes, steam pipes and sewer pipes, as provided in the contract." Did they do any insulating of those pipes at all?

A. Yes. They insulated some of them and most of them are not [236] insulated at all—the same on these pipes, if you notice, in the showroom when you go there. None of those pipes are painted. In fact, it calls for painting the pipes, too, before insulation—and none of them were painted.

Q. Is there any insulation on those pipes?

A. Some there is and some there isn't. In the showroom, all around those heater units, there was no insulation at all—and the steel that's coming down—that was supposed to have been painted in the show room. The two places on the left hand side, as you go into the building in the showroom —they are unpainted.

Q. Do they have any coat of paint on them at all?

A. No, except factory priming—was all.

Q. No. 19: "Failed and refused to take out, reinstall and refinish one section of the cement floor in the showroom which was frozen during construction, and is defective and will not stand." Has he done anything about fixing that?

A. No, that shows up by that big window as you go into the door—by the gas pump—the door next

(Testimony of Burton E. Carr.)

to the office as you go into the first door on the right hand side. There is a space there several feet —and several feet back it was all rough. In fact, the floor was so rough that we put, I don't know, how many coats of paint to try to smooth the floor out—but it's too rough to hold any of these tiled blocks we were putting on there. [237]

Q. Was it your intention to use tile floor there?

A. That's what my intention was if we had a smooth job.

Q. Now, No. 20: "Refused to correct a condition in the floor of the boiler room so that it would drain properly, even though requested so to do." When did you talk to him, if at all, about that boiler room before you served this notice on him?

A. I talked to him several times about it wouldn't drain—because we had to go in the boiler room ever so often to draw the muddy water. We had to clean the boiler regularly—all the water runs to the side of the stairway—and it is about at least an inch and a half or two inches of water in the boiler room.

Q. Has that ever been corrected? A. No.

Q. How many times did you talk to Mr. Gothberg about that ?

A. I talked to him every time and I told him about it every time. He called up and he wanted his money for the building—and I told him when that is completed, well, we would pay him.

Q. Did he ever make any effort to fix it?

(Testimony of Burton E. Carr.)

A. He never made any effort.

Q. 21: "Failed to replace cement blocks over rear windows in shop where the mortar was frozen in installing them and had fallen out over and around the windows, leaving [238] a dangerous condition and causing a waste of heat from within." Has he ever done anything about that?

A. No, that there is the place where they mention about this stove pipe going through the window. The only time that operates is when they are steaming motors and no heat comes out of there to amount to anything—but all along the ledge where this big reinforced beam is supposed to be —I don't know if there is any in there or not, but that is sagged down to the center. You can stand there and look through that and you can see right through it. Also, there are several places upstairs —if you look right you can see right through to the outside.

Q. Mr. Carr, has there ever been any great amount of heat in your little stove there?

A. No, not too great. We use that for steam cleaning cars—and it starts up and we do our steaming and shut it off. In fact, in most places—with those steam plants—they use them right in the garage and they don't have any smoke—but if they get the wrong mixture it does create smoke, but there is no heat.

Q. It is more of a vent pipe, then, than it is a heat pipe? A. Yes.

Q. 22: "Failed to properly install all of the

(Testimony of Burton E. Carr.)

windows in the shop, same being still loose and improperly fitted." Are they in that condition yet?

A. Well, that is the bottom parts of the windows. I was up there last year and they wiggled back and forth. I told him about it and he put some putty around there, I guess, and you know how long they will last.

Q. Is the putty stained or not?

A. It is there, but if somebody would walk up there and shake the windows, I imagine it would shake loose and fall out.

Q. 24: "Has attempted to make an extra charge for moving the steel beam over the electric door, which beam was set at the wrong place by the plaintiff, and through no fault of this defendant, and said plaintiff has constantly demanded extra pay for correcting an error in installment by him." Now, would you explain that to the jury?

A. Well, this electric door—it wasn't the door he ordered originally he told me—so he had to make his own change there because the beam isn't much of a job to change—just two poles here and two poles here — just execute those poles — pull this back—only about 20 minutes would be plenty of time to move this beam back.

Q. How wide is the door?

A. It is about 12 by 12, approximately.

Q. And your steel is in sections of twelve feet, is it?

A. Yes, it is twelve feet for the entrance of the

(Testimony of Burton E. Carr.)

door, and there is approximately twelve feet the other way—tying the steel together. [240]

Q. And that is the matter referred to in No. 24, is it? You have explained that?

A. Yes, it was set at the wrong place—because if he ordered the right hardware for it—it called for an electric door—he was supposed to furnish, and if he ordered the right one it would have fit in without any trouble. But he couldn't get that and he ordered something else, which was no fault of ours. I don't know whether the door was a better door, that we got, or a poorer—I don't know—but it didn't specify any type of hardware—but that's what we got.

Q. Were you to blame in any way for changing that beam?

A. No, the door fell down two or three times while they were trying to make it work.

Q. Does it work all right now? A. Yes.

Q. 25: "The floor in the garage was carelessly and negligently built so that it does not drain, and the work in finishing the floor was not in a workmanlike manner, but is defective and causes large pools of water to stand on the floor, following the time that vehicles with snow on them, or water, are brought into the garage." I believe you explained that this morning. A. Yes.

Q. Now, 26: "Failed to furnish the walls in the men's restroom." [241] Would you explain that to the jury?

A. Well, that was just a regular concrete block—

(Testimony of Burton E. Carr.)

the one wall—I wanted that also covered but he wouldn't cover it so that's just the way it was. We had—I believe we had—yes, we had to paint that ourselves—that wall.

Q. Now, 27: "Refused to allow credit for 77 cement blocks saved by a change in the plans as to the installation of the south door to the garage, which blocks were of the value of 65c per block."

A. It was somewhere around that—I couldn't say for sure. One of the type of block was 55c—and the other one was 65c—but it seems to me those were 65c.

Q. Did he haul the blocks away from there?

A. Yes.

Q. Now, then, 28: "Failed to install proper exhaust pipe with swivel of a manufactured and recognized product, according to contract." Would you tell the jury what was done instead of what was contracted to be done?

A. It was just a homemade deal up there—it's all homemade—the whole thing. In fact, we used it a few times and it would break off—and we would have to go up there with a ladder and get one of the fellows to fix it—and pretty soon it broke off again—and finally they have quit using it altogether.

Q. And those have never been installed by him?

A. No, not a manufactured article that it calls for.

Q. And these homemade things were not workable?

(Testimony of Burton E. Carr.)

A. No, I told him that when he put them on there—and the City told him.

Q. Now, 29: "Attempted to charge and refused to remove from the statement for extras the doors leading to the show room as such doors were included in the original contract, and the attempt to collect for these doors was arbitrary, capricious, and without any justifiable reason." Now, would you explain that? What doors do you refer to there?

A. The three doors where he is supposed to have made a block wall—that was a fire wall in between the office and the other. He didn't put the block wall in but he used lumber and that is where the doors are supposed to come in—at that place—and the door he used was just a one-way door—and we should have a swinging door with all that hardware, which he never put on—and then the sliding door is not the right hardware he is supposed to have.

Q. And that fire wall was never put in?

A. No.

Q. Now, No. 30: "Failed to furnish and properly install doors with closing equipment on all outside constructions as required by the contract." Would you explain that to the jury? [243]

A. Well, when he first started to put them on I told him—he told me he didn't have the hardware to put them on the inside—but he would put them on the outside temporarily. I said, "I would rather have you leave them off instead of drilling some holes in there and have to drill double holes later."

(Testimony of Burton E. Carr.)

He said, "I just can't get the hardware," and he said he would just put them on temporarily, and later on he would put them on the inside because he knew by putting them on from the outside that the cold weather—they wouldn't work—in fact, the front door on the outside was frozen last winter—and we couldn't open it or close it and it froze. We couldn't use that door at all—we could only use one of our front doors.

Q. Did he ever fix that?

A. No, he never did.

Q. I will ask you about 31: "Failed to use heavy wire mesh in gas pump lanes as called for in the specifications." Now, I believe I have asked you about that. Now, 32: "Attempted to and did insist on charging for extras for installing of a hoist, which was included in the contract." Is the hoist you mention here in No. 32 the one you just showed us the picture of?

A. The identical same one—the hoist was ordered before Mr. Gothberg signed the contract. Bjornstad and Clark—they ordered it and I showed him the specifications of the whole [244] thing because we wanted him to build the building—so we showed him the specifications—just exactly what we were putting in there—so when he come to install the hoist he lost the specifications, and we had to have Bjornstad and Clark wire Seattle to have it shipped up immediately so we could install it.

(Testimony of Burton E. Carr.)

Q. Was the hoist in town for several months before it was installed?

A. I wouldn't say several months—it was in town for perhaps some time.

Q. This next one, 33: "Failed to install the mirrors in the restroom." Did he ever do that?

A. Well, I wasn't there when he brought the mirrors, but Jack Akers said he just laid them down there and just took off—so they installed them themselves—that's what he told me.

Q. That was done after you sold the building?

A. Yes.

Q. Now, 34: "Laid cement blocks in sub-zero weather without heat or enclosure in violation of the terms of the specifications and contract, and the mortar was frozen and is soft and of no benefit, and the blocks are loose and caused the building to become unsafe." We have referred to that one enough, I think. Now, 35: "Failed to finish the building at the specified time, to-wit, December 1, 1950." Now, how much later was it than December 1st that he actually [245] claimed that he had the building finished?

A. Well, there was two deals in there—one reason I wanted the payroll on that—there was some extra work we had him do and some of the work that he was supposed to do. In fact, he didn't have the door in when we moved in there—I mean that's when we had all of our stuff in there—on the 15th of February. We couldn't do any work because

(Testimony of Burton E. Carr.)

we couldn't use the door—the door wasn't hooked up so it worked.

Q. When did he get those doors to work so that you could actually use the building?

A. That must have been a week and a half or two weeks afterwards.

Q. Was it as much as March the 1st?

A. It was around March when we had our notice in the paper for opening—it was around March.

Q. Then, I believe you stated in this notice that he failed to finish on December 1st—and he did not go ahead with it so you could use it—until February 24, 1952. Is that about right—about February 24th?

A. Well, it could be somewhere around there because we had a lot of stuff to install and put in; in fact, we had to install the washmobile ourselves—I mean assemble it together. Gothberg was supposed to assemble it but we assembled the tracks on it—and assembled the washmobile. [246] In fact, we assembled everything—and I paid $175 extra for the plumbing part of it—but he was supposed to assemble it—but we did.

Q. He never did assemble it?

A. He never did assemble it, no.

Q. Mr. Carr, I believe Mr. Gothberg testified that while the plans did call for a railing on the stairs, that that could not be put in on account of the condition of the building. Is that true?

A. The railing could have been put in there just the same because you have a railing when you

(Testimony of Burton E. Carr.)

walk down the stairway. There is plenty of room for it.

Q. Did you ever talk to him about installing the railing?

A. I talked to him about it but he stated he didn't need it—but we were paying for it.

Q. And the specifications and plans called for it?

A. Yes, and he never give us any credit for not putting it in.

Q. How about air compressor—did he put that in right?

A. It calls for it down in the furnace room—but he claimed there was not enough room for it, so he made a place to set it on. He just built the platform is all—so he didn't attempt to set the machine in place; in fact, this machine was setting up on the floor—moving it around on this frozen ground—and I hoisted it up because moving it so many times—I was afraid that it was going to get broken and we needed it—so he didn't attempt to hook it up so I had to hook it up myself.

Q. How much did you pay for the pipe?

A. I was billed $6.00 or something—they marked it for air compressor—Anchorage Installation Company. I wanted them to give me the pipe and charge Gothberg and I would install it—but he said no, you will have to pay for that yourself—so we have a bill there that says for the air compressor.

Q. It was $6.00 and something? A. Yes.

Q. You installed it yourself? A. Yes.

(Testimony of Burton E. Carr.)

Q. Do you know how much it cost you to install it—for labor of your own men?

A. I did it personally—except one of the fellows helped me put it in place—but I spent about an hour or an hour and a half on it, I guess—to hook it up.

Q. Did the specifications, as initialed by Mr. Gothberg, provide for his installation of that air compressor? A. Oh, yes.

Q. And did it provide for a little hole, or whatever you call it, in the basement where the heater is? Did it provide for that?

A. There was supposed to have been a place for it but, for [248] some reason, when they put the stove in—they got so many pipes hooked around that they didn't have enough room to put it in—but I imagine if the pipes had been put in properly, there would have been plenty of space for it.

Q. Did the specifications call for it to be placed in that building? A. Yes.

Q. Did the specifications clearly call for the building of the walls, and the floor, and the cover over the little room for the heater plant?

A. Yes, that's right. On one of those plans there—where he initialed it—for that cement slab on the top—that's part of the floor.

Q. Is there any extra cement slab on there—or is it a slab of the floor?

A. It is a slab of the floor with reinforced steel.

Q. A slab of the steel with reinforced steel?

A. Yes, but it called for it in the specifications.

(Testimony of Burton E. Carr.)

Q. It was all set down in the plans?

A. Yes, it shows a picture—and he initialed it.

Mr. Bell: You may take the witness.

Court: Counsel for plaintiff may examine.

Cross Examination

Q. (By Mr. Arnell): Mr. Carr, in response to Mr. Bell's questioning about [249] Item 20, which is about the floor of the boiler room, you said you had talked to Mr. Gothberg several times about this particular item. Is that not correct?

A. You will have to read the item—I don't know what 20 is.

Q. That relates to your complaint about the floor in the boiler room—that it was not level.

A. Yes.

Q. Did I understand you correctly to state that you had talked to Mr. Gothberg several times about this? A. Yes, I did.

Q. Did, on any of these occasions, he ask you for money or demand payment of these other amounts that were due?

A. The way he demanded his payments—he was supposed to have had a bond——

Q. Just answer my question.

A. Well, you will have to ask the question again.

Mr. Arnell: Would the reporter please read the question?

Reporter: "Did, on any of these occasions, he ask you for money or demand payment of these other amounts that were due?"

(Testimony of Burton E. Carr.)

A. Yes, he did.

Q. And you didn't pay him, did you?

A. He wouldn't tell me how much the complete amount was—and he wouldn't give me a statement —he said it was too much work. [250]

Q. Do you mean to imply to the jury that you had not received statements before that?

A. I didn't receive any complete statements on it until March the 4th of this year—and he called me up and said he was going to sue me—I said, "Gothberg, you will have to sue me for the simple reason I don't know how much I owe you," and he said, "I know how much it is—it's $18,000.00." I said I wasn't paying $18,000.00 without a statement. I said, "You mail the statement," and he said, "It's too much work."

Q. Yesterday you offered in evidence a statement, showing a bill on the foundation of approximately $3,900.00? A. Yes.

Q. Do you mean to tell the jury that you never got other billings similar to that, for the progress of the extra work?

A. This foundation deal—the City was paying——

Q. Just answer my question. Do you mean to imply to the jury that you never got periodic billings for this other work?

A. There might have been—but not on the extras. I never did get billing on the extras until March the 4th.

Q. You mean to state, then, that you never got

(Testimony of Burton E. Carr.)

a bill of any kind other than the final bill that was given to you, as you say, in March?

A. Complete bill, no,—March the 4th.

Q. But did you get interim statements prior to that? [251]

A. I got odds and ends—the one for moving the foundation—we got that.

Q. Did you get interim billing regarding the finishing work for any interior of the show room?

A. I don't remember off hand what we got—I would have to see the bill—identify the bill.

Q. Mr. Carr, you are familiar with these plans and specifications. Did I understand your testimony yesterday to be to the effect that Mr. Gothberg's contract included the furnace room in the sub-foundation work?

A. I want to ask a question—what do you mean —what part of the contract—the first part or the last part, or what are you talking about?

Q. Well, are there two parts to that particular phase of this building?

A. Yes, the first part was moving the foundation back—and there was a second part to the regular contract.

Q. What phase of the work did this written contract cover? A. The original contract?

Q. Yes.

A. Whatever he put his signature on it—the dotted line there—what he signed for.

Q. Do you mean the contract on May 25th included both phases of the foundation work?

(Testimony of Burton E. Carr.)

A. How do you mean? [252]

Q. You just informed the jury that there were two phases to this foundation work. I am trying to find out if the contract signed in May included both phases, according to your version?

A. No, there was two separate contracts.

Q. Then, the May 25th contract, Mr. Carr, included only the moving of the foundation back, and reconstructing the extra twelve feet—is that not correct? A. Yes, that's right.

Q. Well, now, when did the furnace room come up for discussion?

A. Well, you see—if you will let me explain this thing a little—the City——

Q. Answer my question.

Mr. Bell: Let him answer it.

A. I am answering it in a way that they can understand me. The way you are trying to twist me around——

Mr. Arnell: I am not trying to twist you around. I am trying to get at the meat of this thing.

Court: You can answer his question first and then explain.

A. It never did come up for discussion at that time.

Court: Now, if you want to make an explanation, go ahead. This is about the furnace room?

A. Yes. This foundation—the City gave me a permit to put a foundation—that is, a regular foundation down—and so we set that down in place and I was figuring on putting the [253] furnace

(Testimony of Burton E. Carr.)

room back of the front foundation because I had 140 by 50 feet—so I could have working space—so when the City made me move back that ten feet—and I had to take twelve feet on account of this steel I had already bought—so we had to move back twelve feet. Well, I had to take it in where I wanted to put my furnace room—but the furnace room was supposed to be on the outside and we had to change it and put it in on the inside of the building—and the City was going to pay for this change—so I wanted this foundation moved from the front to the back—and the two walls was supposed to be put in—that's in the furnace room and that was to be charged to the City—so I could keep the bills one to the other. But the top was not put in—I mean that was part of the regular contract.

Q. Well, did I understand your testimony, Mr. Carr, to be that, under the original May 25th contract, all Mr. Gothberg was to do was to move the foundation back, in accordance with the requirements of that plan—twelve feet?

A. Plus putting in those two places, which would be extra work, which would take about two yards of cement and cost around $14.00 or $17.00, I believe.

Court: Will you repeat the last part. He was to move the two walls, front and back, and what else?

Mr. Carr: And then when they was pouring this concrete, they would have to pour—only one wall would be poured. You see, [254] the whole concrete

(Testimony of Burton E. Carr.)

was down between six and seven feet, so we had to pour a back wall, anyway, so that would be two extra feet down where this boiler room goes, and then they had to make one extra wall—that would make it four walls. I mean it had to be this way, anyway, so all they had to do was put in a wall here, and here up to the staircase—a short wall here and a long wall here—but I agreed to take care of that because we were going to charge that to the City because that was expense they made me incur.

Court: I think we will suspend. The jury, during the recess, will remember the admonitions of the Court as to duty. Court will stand in recess for 10 minutes.

Thereupon, the court recessed at 4:02 o'clock, p.m., until 4:12 o'clock, p.m., at which time the following proceedings were had:

Court: Mr. Carr may resume the stand. Counsel for plaintiff may proceed with examination. The record will show all members of the jury present.

Q. Mr. Carr, Plaintiff's Exhibit No. 3, which is BCG 1, is on the board there, and I ask you now, whether that was the only plan of the foundation that was available on the 28th day of May, 1950, at the time the written contract was signed?

A. I never got a copy of that particular one, but I had a copy made of it just a few days ago.

Q. What is the date on that plan—it is down in the lower right hand corner.

A. April 5th, 1950.

(Testimony of Burton E. Carr.)

Q. Were there other plans available at that time, regarding the foundation or basement?

A. No—yes, there was. This was made for quite sometime—this plan was made when we had the steel made—I mean this part in here—this was traced from another plan.

Q. I know, but were there any other plans pertaining to the building as it was finally constructed, available at that time?

A. At that date, I couldn't tell you. The plans were in the progress of being made at that time. You can look at the date on the next plan there, and that would give you the date they were made.

Q. At the time this contract was negotiated, or signed, did you discuss it personally with Mr. Gothberg—the first contract?

A. Yes.

Q. Did he have this exhibit at that time? Did you furnish it to him?

A. I believe there was kind of a pencil deal that was made out—it could have been the same one—I wouldn't say for sure, but that would be exactly the same—that was the first contract. [256]

Court: What is that—plaintiff's exhibit?

Mr. Bell: It is Plaintiff's Exhibit 3 and it is marked BCG 1.

Q. Mr. Carr, calling your attention again to Plaintiff's Exhibit 3, there is a cross section of the foundation and also the corners there—now, according to that plan, how deep was that foundation to be built into the ground?

(Testimony of Burton E. Carr.)

A. When that foundation was put in the first time——

Q. Just answer. How deep does this plan call for, for the foundation to be constructed in the ground?

A. I will tell you—it was put in on a cost plus basis. I was forced by the city engineer to get this certain contractor for putting it in, so it cost me so much money I had to fire him—so originally they went down about six feet.

Q. At that time, did you think it was necessary to go down six feet?

A. They told me they had to be sure they was down to good gravel—but they should have stopped a little sooner.

Q. Was that on the original foundation, constructed by Breeden and Smith? A. Yes.

Q. Did you consult with Mr. Anderson when Plaintiff's Exhibit 3-C was prepared?

A. This is Number 1, isn't it?

Q. That's right. Did you consult with Mr. Anderson at the time [257] that was prepared?

A. Yes. I want to withdraw something—Breeden and Smith made the plan first out of his own plan—and Mr. Anderson copied the plan—also his plan—and that's this one here—a copy of it. Breeden and Smith made their own plan and this is a copy—because when we had this here plan made, we sent out and bought the steel to fit the building—and we had the steel come up to fit the building.

Q. Mr. Carr, sometime during the course of this

(Testimony of Burton E. Carr.)

trial, you have testified that the old portion of the foundation went down six or seven feet, is that correct? A. Yes, that's right.

Q. Now, on Plaintiff's Exhibit 3, which is BCG 1, what is the depth of the foundation, including the footing?

A. You mean when Breeden and Smith put it down?

Q. No, after the plans were revised and provisions made for the extension of the building, and moving the front back. According to that plan, how deep was the foundation and footings supposed to be?

A. The same depth because the plan that he had there shows how to connect the front portion. They cut that off—and then they moved that part ahead and poured the concrete. But that is supposed to be the same depth—otherwise you couldn't secure it.

Q. Will you come down to the exhibit, Mr. Carr, and point out [258] to me where the depth of the foundations is shown to be six or seven feet?

A. I couldn't tell you on that, no. We are going by the original contract so it was supposed to be the same as before—in the same position—look the same, and everything else.

Q. Will you point out the cross section of the foundation and footing to the jury there?

A. Here. It was here originally.

Q. The cross section or the face view of it?

A. What do you mean, cross section?

(Testimony of Burton E. Carr.)

Q. Well, those pictures each show the thickness of the wall and the depth of the foundation?

A. I am not familiar with building—I am not a building contractor—I am a garage man.

Q. According to this cross section, the depth of the foundation is three feet, and the footing is two feet—is that correct? A. I don't know.

Court: The witness should not be pressed for an answer if he doesn't understand those drawings. If the exhibits show what counsel's questions imply, why, that can be shown to the jury by some other witness or perhaps the exhibit itself will show it.

Court: Mr. Bell, did you intend to put this check in as [259] an exhibit—the check payable to Alaska Engineering Supply—a check for $2,700 and some odd dollars? If not, you better reclaim it.

Mr. Bell: Absolutely. I forgot to offer it. May I offer it now, even though it be out of order. The purpose of offering it is to fix the date.

Mr. Arnell: I have no objection.

Court: It may go in as Plaintiff's Exhibit K and may be considered read. It has been read—part of it.

Mr. Bell: Mr. Carr read it.

Q. Mr. Carr, you have a drawing before you marked BCG 5, and which is the same as Plaintiff's Exhibit 4-D? A. Yes, that is BCG 5.

Q. And what is the date of that?

A. That is 7-5-50.

Q. And what does that plan purport to represent?

(Testimony of Burton E. Carr.)

A. That is to represent a portion of the building.

Q. Well, what portion?

A. That is the engine room—the boiler room.

Q. Did I understand your early testimony to be of the effect, Mr. Carr, that at one time you intended to put the boiler room outside of the building? A. At one time, yes.

Q. And then, as a result of the action of the City in requiring you to move the building back, you had to redesign the [260] building and provide space for the boiler room inside—is that correct?

A. Yes.

Q. How deep, according to the plan, does the boiler room have to be, Mr. Carr?

A. Well, I don't know if there is any figure here—I know the other one was about eight feet.

Q. Is there a footing underneath the foundation wall, also, around the furnace room?

A. Well, what's a footing? If you could point it out to me I could tell you.

Q. Well, your footing, Mr. Carr, would be this wider portion of that wall here.

A. Oh, yes. I see now.

Q. Is there provision for a footing on that drawing? A. Yes.

Q. And how high is the wall?

A. You mean from the top to the bottom?

Q. Yes.

A. I see a figure here of nine feet, four inches from the bottom of the footing at the top of the wall—I mean to the lower part of the slab.

(Testimony of Burton E. Carr.)

Q. Mr. Carr, do you admit or deny that the work required by Plaintiff's Exhibit 4-D, which is BCG 5, is an extra?

A. As I explained to you—it is an extra. [261]

Court: Can you answer that yes or no?

Mr. Carr: Yes, it is an extra—part of it—not the whole thing.

Court: You may explain.

Mr. Carr: It says on the contract that the walls as now in place—it meant that the walls he put in —I think it originally was $2,500, and something, for the original contract—and this is extra work to be added on.

Q. Now, when you refer to the extra work——

A. That is to put in one building wall—eight feet—and then partially the other way that goes to the stairway.

Q. In other words, would there be two full walls the length of the boiler room, to be extras?

A. No, the reason they put this wall in the same time—if we had to put the regular foundation in and then put this in afterwards—we would have had to cut up that foundation again—so we decided to put those two walls in at one time.

Q. Now, Mr. Carr, the difference in depth between the first plan and this No. 5 that you have before you, would be extra, would it not, so far as the two outside walls are concerned?

A. Only on that one corner, I believe—that engine room is about eight feet square—it seems to me—it could be smaller or larger.

(Testimony of Burton E. Carr.)

Q. Actually, including the stairway, is it not about 14 feet [262] on the one side—17 feet?

A. Yes, you're right.

Q. The stairway would be an extra then, would it not?

A. No, it wouldn't be. That would be included in the regular contract because I just wanted those two walls put in so it wouldn't interfere with the rest of the building.

Q. Are you referring to the two outside walls or the two inside walls?

A. The two inside walls. It would be easier if I would point it out on the board, I believe. Of course, I know you know.

Q. Do you want to step down?

A. Yes. This foundation here was here—and we moved it back—well, the wall that comes through here was filled in the same time. This wall here was—and this had to be deeper and this had to be deeper—and this wall from here to here—and then back into here. This is a short span here—so this would be about twelve feet—then, the way it looks, it would be 12 by 12—or 12 by 8.

Q. Then the boiler room did constitute an extra —at least partially so? I mean for finishing the boiler room?

A. Mr. Gothberg initialed the slab on this one here for the slab and the stairway.

Q. When did he initial BCG 5, which you have before you, Mr. Carr?

(Testimony of Burton E. Carr.)

A. He didn't initial this one—it is the one that we have then, [263] I believe.

Q. Well, was that initialing done at the time the contract was signed?

A. It was done at the time the contract was signed.

Q. In other words, September 19th would be about the right date for the initialing?

A. When the contract was signed.

Q. Well, were not all of the fittings and the foundation—and the boiler room walls and the boiler room stairway in on that date?

A. Well, I couldn't tell you—the only thing—just the walls are all I can remember. The stairway could have been in—I wouldn't say for sure. I don't remember seeing it.

Q. The outside walls were in?

A. Yes. And this wall was up to the stairway. The stairway could have been in—but the agreement was just to put in these two walls.

Q. Then all of the additional excavation—the depth of the outside walls and the two inside walls —was all done at the time the contract was signed. Is that correct?

A. You mean the second contract?

Q. Yes.

A. Yes, that was all done.

Q. They were also done at the time Mr. Gothberg initialed Plan No. 5, were they not? [264]

A. It wasn't completed.

Q. Perhaps not 100%.

(Testimony of Burton E. Carr.)

A. No, this portion of this wall—so that we could pour them in together—so that it would be solid.

Q. Well, Mr. Carr, do you admit now, or deny, that you owe Mr. Gothberg some additional money over and above the $2,542.00 for this extra work?

A. I admit I owe him some—but not $1,600.00.

Q. When you got the $3,900.00 statement, did you ever ask him for any explanation of the additional charge?

A. I don't remember. I know there was an extra charge on there, but I didn't know just how much it was going to be.

Q. Do you mean to state that you expected some additional charges, after you received the $3,900.00 bill, as a result of this particular work?

A. No, I didn't expect any more than that $3,900.00—that was plenty high for doing that work.

Q. Did you object to the $3,900.00 bill, or did you accept it?

A. Naturally I didn't accept it because I didn't pay it.

Q. Did you dispute it?

A. One reason we didn't pay it was because we wanted to present it to the City for causing us all this here trouble.

Q. Did you ever send a bill to the City in the amount of $4,000.00—whatever this amount that is due is? [265]

A. I don't remember. We have been going round and round on that deal—and they finally

(Testimony of Burton E. Carr.)

offered me $1,310.00 for the whole deal—that's what they want to pay me for it.

Q. Yesterday, Mr. Carr, Mr. Bell went into your employment of the architect, Mr. Anderson, and you said that Mr. Gothberg recommended him to you? A. That's right.

Q. Did he actually recommend him—or did he suggest his name, among others?

A. No, he recommended me to him—and besides he was the one that looked me up—and Gothberg brought him over to the house.

Q. Now, you testified that you paid Mr. Anderson, or Mr. Smith, or both of them, approximately $2,700.00 in November and you have introduced a check to that effect? A. Yes.

Q. What does that payment represent?

A. Well, that payment represents—he told me that he would either be there himself all the time—and if he was not able to he would have a man on the job every day until the job was completed.

Q. Was this $2,700.00 supposed to represent architect's fees for drafting plans, and also inspection fees?

A. That is the way I understood it.

Q. You paid him in full, then, on November 8th—about sixty [266] days before the building was actually completed? Is that correct?

A. Right.

Q. Why did you do that?

A. Well, he wanted his money.

Q. Is it not a fact, Mr. Carr, that the payment

(Testimony of Burton E. Carr.)

that you did make to him was in payment of his fees for drafting the plans and the specifications only?

A. Well, he drafted them—and he give me the bill—how much it was. I asked Gothberg and he said the plans were O.K.—that everything was all right so I went and paid him—so as long as he was satisfied with it—and he agreed that he was going to inspect the building, which he didn't.

Q. When you paid him $2,700.00, did you expect him to render any more services, and inspect the building during the process of construction?

A. Oh, yes.

Q. Did he render those services later on?

A. Not that I know of—maybe once or twice, but that's all.

Q. Did he ever discuss anything with you in regard to the building, or any changes?

A. Well, no, he didn't say too much about it. Usually our conversation was over this heat in the building, because the fellows couldn't work—that was a big argument about the thing because I was worried about the blocks being [267] frozen and cracking up.

Q. Did he continue in a supervisory or inspector's capacity until about January 10th or 15th of 1951?

A. Well, I never did at any time discharge him from the job.

Q. In other words, he was continuing then to act as an inspector on the building?

(Testimony of Burton E. Carr.)

A. Well, he never showed up. I didn't have to discharge him—he just didn't show up.

Q. You were handed this morning, by Mr. Bell, Plaintiff's Exhibit 7, which was a letter signed by Mr. Anderson, approving certain changes. The letter, as I recall, was dated December 28th. Did you discuss any of those changes with him?

A. No, I didn't discuss it, but it was dated in December—and part of the work was already in—I didn't see Mr. Anderson to talk to him about it—and it was just between I and Gothberg—and Gothberg evidently had put those changes in.

Q. Your testimony is that you never discussed these proposed changes with Mr. Anderson, and knew of his approval or disapproval?

A. I talked with Gothberg about it.

Q. You never talked to Mr. Anderson?

A. I don't believe I did.

Q. Mr. Carr, under the plans and specifications, was any finish [268] work required of Mr. Gothberg in the show room?

A. You mean finish carpentry work?

Q. Yes. A. No.

Q. What would include the paneling and the framing of the doors?

A. We paid for the finishing work—the Husky Furniture Company — between $2,700 and $2,800. Mr. Gothberg did some, too.

Q. What work did the Husky Furniture Company do there, Mr. Carr?

A. They put up all of the panels and did all the

(Testimony of Burton E. Carr.)

panel work. Mr. Gothberg—he put all the heavy beams around in there—two-by-fours and two-by-sixes—and he put the ceiling on.

Q. Did he also install the finish material on the ceiling—or did Husky Furniture do that?

A. I believe Mr. Gothberg did that—he put that on. We paid for the material though—I bought the material previously.

Q. In other words, all of the work that was done in the show room was extra—is that correct?

A. I wouldn't say all because some of that there called for blocks—that fire wall there. I was led to believe by Mr. Gothberg that I was to pay for that myself until I begin reading the specifications—and so I had to buy the fire board and I paid for it myself. It is supported by four-by-eights for fire protection along the side—but after [269] reading it I found out he was supposed to furnish that himself.

Q. The original plans and specifications called for—— A. Brick.

Q. Some kind of a block partition?

A. Yes.

Q. Who changed that?

A. Mr. Gothberg gave me the impression that that didn't include any there until I found it out afterwards—until it was completed.

Q. When did he give you that impression?

A. At the time he was building the other part.

Q. Have you been billed for the wood partition that was put in there?

(Testimony of Burton E. Carr.)

A. Yes, I have been billed for that.

Q. Are you mixing up the partition with the other finished work, Mr. Carr?

A. It would be pretty hard. I have hired a lot of men—it would be hard for a carpenter to segregate his work—what he was supposed to do, because I was paying for the heat and the water that he was supposed to—because he didn't have all of his completed. He told me he did but he didn't. I don't see how he could segregate it.

Q. Mr. Carr, we have introduced all the statements submitted to you. Have you examined those to determine whether or [270] not you have been charged for this partition wall?

A. I am not a carpenter—but I am going to have one tomorrow to possibly find out what footage is in there, and see what the bill is.

Q. I am trying to find out if you think you have been charged for the partition, as distinguished from other work that is an extra.

A. I am not saying if I did or if I didn't. It's pretty hard to say until we figure it out. The way the rest of the building is, I am in doubt one way or the other.

Q. Did the extra work in the show room, done by Mr. Gothberg, include installation of all the ceiling joists, as well as the finish work on the ceiling? A. Yes, he did all that.

Q. It included, then, putting in the back framework, and studs, and everything all around the entire interior, did it not?

(Testimony of Burton E. Carr.)

A. Well, on that wall—I don't see how you can regulate it.

Q. Well, he did put in the studding for the walls there, which Husky Furniture came along and put on the paneling?

A. I don't know. Does studdings run up and down, or back and forth?

Q. Up and down.

A. Yes, all the studding was on that one wall there. I didn't know at the time but he was supposed to put that in with blocks. I would rather have it block—if I knew there [271] was blocks there at the time.

Q. You are referring to the partition?

A. Yes.

Q. How about studding along the west wall, and north wall, and east wall?

A. Well, that studding—Mr. Gothberg put in on the north wall—there isn't much studding there—mostly all glass.

Court: We will suspend at this time. The trial will be continued until tomorrow morning at 10:00 o'clock. You may step down. Ladies and gentlemen of the jury, the trial of this case will be continued until 10:00 o'clock tomorrow morning so you will be excused to report at 10:00 o'clock in the morning. In the meantime, you will remember the admonitions of the Court as to your duty, and you may now retire.

Whereupon at 4:57 o'clock, p.m., September 24, 1952, the trial of the above entitled cause was con-

(Testimony of Burton E. Carr.)

tinued until 10:00 o'clock, a.m., September 25, 1952.

Be it Further Remembered, That at 10:00 o'clock, a.m., September 25, 1952, the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: If the parties to this case now on trial desire [272] to offer amended pleadings, I wish they would be filed at the earliest convenient time so that note may be taken of them in the instructions. As far as I know, it will be necessary to suspend this trial at 3:30 this afternoon, to take up a criminal case and a long deferred argument in a civil case of pressing importance. The witness, Mr. Carr, may resume the stand, and counsel for plaintiff may proceed with examination.

Q. (By Mr. Arnell): Yesterday, Mr. Carr, we were talking about the finish work that was done inside the show room, and we got around to the question of the partition. How high was the original partition to have been built, according to the plans and specifications that are in evidence?

A. Well, I don't know exactly—but it would have to be at least twelve feet, because if that is a fire wall in there—the twelve feet would come up to the bottom of the beam, more than likely. According to City ordinance, it would have to be all the

(Testimony of Burton E. Carr.)

way up—it would have to be built in accordance with the City ordinance.

Q. Do you know what the plans called for as regards to the height of the partition?

A. I couldn't say—I know it was to be according to the City ordinance because we built the other all the way up to the ceiling—twenty-four feet.

Q. When you say the partition should have been twelve feet, [273] are you stating that to be a fact, or is it your opinion?

A. It is my opinion. I believe it should be up twenty-four feet because that's where we put it now.

Q. What is the height from the floor to the steel beams?

A. Twelve feet—no, it would be twelve and five about eighteen feet.

Q. Actually, according to the plans, Mr. Carr, that partition was to be constructed only eighteen feet from the floor, was it not?

A. I couldn't tell you that—but in order for a fire protection it would have to be all the way up.

Q. Was it to be a fire wall, or just a partition?

A. That was a fire wall.

Q. It definitely was to be a fire wall?

A. Yes.

Q. Now, at that time, Mr. Carr, do you admit or deny that you owe Mr. Gothberg for the costs incurred by him in roughing the show room?

A. Well, some of this is extra work. I admit some of the work is extra—but I don't admit I owe anything because the damage on the building is

(Testimony of Burton E. Carr.)

about three or four times the amount they are claiming—so I don't owe Mr. Gothberg anything.

Q. What do you think your indebtedness is to him by reason of this particular extra work, irrespective of the claim [274] you have for damages?

A. Well, every day, sitting in here, more and more piles up because now another thing came up that probably the building may have to be tore down, and I am not sure.

Mr. Arnell: Miss Keeney, will you read the question? And I ask that you answer the question.

Mr. Bell: I believe he has answered it.

Court: The question may be read.

Reporter: "What do you think your indebtedness is to him by reason of this particular extra work, irrespective of the claim you have for damages?"

A. Well, right now it would probably run around about $40,000.00—the way I can figure it out—with the information I have this morning.

Mr. Arnell: I move that the answer be stricken and the witness be instructed to answer the question. It is not a responsive answer.

Court: The reporter will read the question again.

Reporter: "What do you think your indebtedness is to him by reason of this particular extra work, irrespective of the claim you have for damages?"

Mr. Carr: I don't quite understand.

Court: What extra work do you refer to, Counselor?

(Testimony of Burton E. Carr.)

Mr. Arnell: The extra work we have been discussing in this show room. [275]

Court: The extra work involving the partition?

Mr. Arnell: No, it is not the partition, your Honor. I will try to rephrase the question.

Q. As I understood your testimony yesterday, Mr. Carr, it was to the effect that Mr. Gothberg roughed in the show room, including the ceiling, is that correct? A. Yes.

Q. Do you now admit that all of that work was an extra, and that it was not included within the terms of the contract?

A. At that time it was figured as an extra.

Q. Well, is it still regarded as an extra?

A. Not exactly, no. As I say—I don't owe Mr. Gothberg any money on that.

Court: It is not a matter of whether you owe him anything or not. The question is what would be the value of that, in your opinion, as an extra?

Mr. Carr: I really don't know because I have a carpenter down there this morning figuring now. I couldn't answer that question—what the amount would be.

Q. Mr. Carr, do you recall that your deposition was taken before Miss Keeney on the 28th day of June, 1952? A. Yes, I remember.

Q. Do you recall testifying, at that hearing, in regard to this particular extra work?

A. I recall some what I said. I don't know if I recall all [276] but you ask me and I will answer it.

Q. Do you recall that I asked you the follow-

(Testimony of Burton E. Carr.)

ing question: "Yes, assuming that the building was completed, as you say it should be?" and your answer, "Oh, I think the finishing up inside was around $5,500.00, I believe, if I remember right now." Do you recall that?

A. I recall that. That was the bill that Mr. Gothberg sent for extra—it was approximately that amount—I wouldn't say to the exact penny, or the exact dollar.

Q. Then I asked you the following question—does the Court have the deposition?

Court: What page, Counselor?

Mr. Arnell: Page 14, your Honor. I am sorry —at line 4.

Q. I asked you the following question, after you gave me the answer that I have just read: "Q. When you say the inside, is that the show room?" and your answer: "A. That's the show room." Do you recall giving that answer to that question?

A. Well, that would be the show room—that is the show room and the offices together.

Q. Then at line 6, page 14, of that deposition, I asked you the following question: "And you would owe that?"—and your answer reads: "I would owe that—and then the foundation—I would owe that." Do you recall that answer?

A. That is on the foundation on the City—I don't know what [277] foundation you mention there on that—I don't recall.

Q. Well, were the answers that you gave at

(Testimony of Burton E. Carr.)

that deposition hearing, regarding the inside work costing about $5,500.00 correct, or is it wrong?

A. It is correct.

Q. Well, then, your testimoy today should be that the cost of the extra work inside the show room is practically $5,500.00 or the amount Mr. Gothberg claims, is that correct?

A. Well, it was the amount that Mr. Gothberg claims.

Q. Well, Mr. Carr, Mr. Bell introduced yesterday an invoice which was admitted as your Exhibit G, and a part of that invoice there was an extra, designated "sign post". Mr. Carr, you have been handed Defendant's Exhibit G.

A. I remember that yesterday.

Q. Was the material and the labor for the sign post an extra? A. Yes, it was.

Q. In other words, the sign post was not included as a part of the plans?

A. No, it was not included as a part of the plans.

Q. Would you describe for the jury, Mr. Carr, where that sign post was located, with reference to the front of the building?

A. The sign post was stuck out straight from the building. It was not facing on the building—a very short piece of [278] steel there—I think about four-inch pipe—and, let's see, how long it is—it doesn't say how large it is. It is $18.00 for the pipe.

Q. To what, inside the building, was that steel pipe attached, Mr. Carr?

(Testimony of Burton E. Carr.)

A. I wouldn't know that—whether it was attached to the blocks, or how it was attached.

Q. Do you mean to imply to the jury that it was just shoved into the concrete block in between them?

A. The way the rest of the work was done, I wouldn't doubt it.

Q. Isn't it a fact that that pipe was attached, in some way, to the steel beam that has been discussed?

A. It should be attached to something there.

Q. I didn't ask you if it should be. I asked you if it was not a fact that it was attached originally?

A. I don't know whether it was attached, or just pushed in there—I wouldn't know.

Q. Is it not a fact, Mr. Carr, that there are two steel beams in that front?

A. I couldn't answer you that—I know what I ordered and Mr. Gothberg had a drawing of the steel beams that was furnished—and he could read on the blueprint just what was furnished.

Q. Is it not a fact, Mr. Carr, that one of the steel beams carries the marquee, and there is another beam that carries [279] the roof?

A. The whole structural steel that carries the roof is the one I ordered from Seattle, and had it delivered on the property—and that was all there—and the part of the building is part of the contract—and that beam you mention is part of the contract because that is part of the building.

Q. Then there are two beams—is that correct?

(Testimony of Burton E. Carr.)

A. There may be three or four hundred beams on the whole structure.

Q. Well, there is one beam that caries the marquee, is that correct? That is the one you pointed out to the jury yesterday?

A. That is built in with the marquee—that's part of the marquee.

Q. And isn't there another beam over and above that, that carries the roof?

A. Yes, not a beam—a whole lot of beams together carries the roof.

Q. I realize they are all tied in together, Mr. Carr, but there was another beam that had to be purchased by Mr. Gothberg, wasn't there?

A. I knew he had to purchase all material I didn't furnish.

Q. But when you signed the contract, you represented to him that all of the structural steel was on the site, or at least available? [280]

A. The structural steel—what I furnished—was on the site.

Q. Well, if the second beam were not there, would it not have been included in the steel that you represented as on the site?

A. Would you mind asking me that question again, please?

Q. If the second beam were not there, would it not have been included in the steel that you represented as on the site?

A. It would be included on the site because that

(Testimony of Burton E. Carr.)

was part of the original contract—the same as the rest of the timbers.

Q. Mr. Carr, though under the specifications that were agreed to be a part of the contract, it specifically stated that you were to furnish the steel, did they not?

A. Oh, no. The steel was on the sites of the building, but there is other pieces of steel, too, that Mr. Gothberg furnished to hold the steel and pieces of wood—it is all one piece—just like anything else, you have got to have something to hold it up there—you just can't stick it up there in the air on sky hooks.

Q. Mr. Carr, you testified yesterday that Mr. Gothberg called off—I don't know—it says here 70 or 100 pumice blocks, that you never received credit for. Did I understand your testimony correctly?

A. I didn't say 70 or 100—I said he hauled off some blocks. I bought all the blocks for the building myself—practically all of them. [281]

Q. When you say "practically all of them", would you state for the benefit of the jury how many?

A. I haven't the information right here, but I probably could get the information—but pretty close to around 3,000—more than that. I made two purchases of blocks—quite a large stock of them—and Gothberg hauled some in—and he didn't put the ones that was supposed to have gone in the fire wall.

(Testimony of Burton E. Carr.)

Q. Under the heading, "Special Conditions", there were 3,250 8 by 8 by 16 standard pumice blocks on the site. Is that correct?

A. There was quite some number—more than than—but the architect said he would get the number down a little bit. Oh, yes, I see—approximately 3,250 8 by 8 by 16 standard.

Q. And those are designated as Bullnose and Double Bullnose? A. That is right.

Q. In similar quantity? A. Yes.

Q. Do those figures represent the approximate number of blocks that were on the site at the time the contract was signed?

A. Yes—and that was on the property—and Gothberg knew it was on the property—and everything else extra he was supposed to furnish—all the lumber and material—and it says so in the contract—and he signed it.

Q. In other words, if there were extra blocks needed, he was [282] supposed to furnish them?

A. Yes.

Q. Mr. Carr, do you know how many blocks were actually put into that building?

A. No, I wasn't interested in that. I was interested in what the building was going to cost me.

Q. Is it not a fact Mr. Gothberg furnished approximately 1500 more blocks?

A. I wouldn't know whether it was 1,500—or 15—or 5,000—I wouldn't know.

Q. Would that figure be approximately right?

A. I couldn't tell you.

(Testimony of Burton E. Carr.)

Q. Do you think that that entire building was constructed of the blocks that were represented in the specifications, or did it take more?

A. I don't know that that has anything to do with this steel.

Court: Whether it has anything to do with it or not, answer the question.

A. I know it took more, but I wouldn't know how many.

Q. Did it require more blocks, Mr. Carr, than you have been claiming credit for from Mr. Gothberg, because of these blocks you say he took away?

A. Well, I couldn't hardly say that—I wouldn't know—I don't know just how many he took away. I know he took quite a bunch away in the truck.

Q. How many blocks were saved by cutting a door in that south wall?

A. I couldn't tell you that off hand.

Q. Approximately how many?

A. I am not a builder—but it was 8 by 8, and they are 16-inch blocks, so it could be figured out.

Q. According to Item 26, Mr. Carr, in the demand you claimed credit for 77 cement blocks at 65c a block, which equals $50.05 for the blocks that were saved by cutting the door. I presume that is the one in the south wall—is that correct?

A. I imagine that was it.

Q. Is this 77 the number of blocks credited, according to your estimation?

A. I had somebody else figure that out so that is the figure they gave me—approximately what it

(Testimony of Burton E. Carr.)

would run—probably that is the reason it is down there.

Q. Did it take more than 77 blocks, over and above the total specified in the specifications, to complete the building as it now stands?

Mr. Bell: Object to that question. He has answered it three times in three different ways that he doesn't know.

Mr. Arnell: Three different ways?

Mr. Bell: Yes, sir. The same question has been asked in three different ways and he answered each time that he doesn't [284] know. Object to the question as repetition, and irrelevant, immaterial and incompetent.

Court: The objection is overruled. The witness may answer if he knows. The question will be read.

Reporter: "Did it take more than 77 blocks, over and above the total specified in the specifications, to complete the building as it now stands?"

A. I really don't know just how many blocks it took to complete the building, because I didn't figure it out—I wouldn't know that question.

Q. You have been handed Defendant's Exhibit E, Mr. Carr, which is the check in payment of the bill to Anchorage Installation.

A. Yes.

Q. I ask you—what did that work cover?

A. Well, that covered the pipe that was put in too small—and they had to tear that down and put in the pipe right.

Q. When you say that the pipe was put in too

(Testimony of Burton E. Carr.)

small, or smaller than required by the specifications, will you please, Mr. Carr, turn to the specifications concerning these particular pipes concerning the size of the pipes to the washmobile?

A. I think it's two-inch pipe. Mr. Gothberg knew that before he hooked it up, because I gave him the plans and he lost them. [285]

Q. What did the specifications call for?

A. Two-inch pipe. It calls to hook up the washmobile—and it took two-inch pipe—and he put half-inch pipe or inch.

Q. Where was the location of the washmobile originally established?

A. I planned to put it just about—oh, it would be about 20 feet further away than it is now. It is cheaper to put it where we did than it was previously—and we never got the credit for the pipes.

Q. Then it is your tesitmony that, according to the original plans and specifications, it was 20 feet away from where it is presently located?

A. Yes.

Q. Now, who ordered the work done that is involved in this payment here?

A. Well, I ordered the work done. How do you mean—the work done—for changing it back to this other position?

Q. Did you order the change made?

A. Yes, I ordered the change made to change it to a different position, but it didn't take as many pipes as originally.

(Testimony of Burton E. Carr.)

Q. Did you make that change order after you had entered into possession of the building?

A. I don't understand you.

Q. Did you ask Anchorage Installation to change these pipes after you moved into the building? [286]

A. Yes, that's when we were moving into the building at the time—and the washmobile wouldn't work on one-half or three-quarter inch pipe—and it takes two-inch pipe.

Q. Then you ordered the change, is that correct?

A. Yes, I ordered the change, but it wasn't hooked up according to specifications—and they had to change it—and Gothberg wouldn't change it.

Q. Can you point out in the specifications, Mr. Carr, where the hookup did not comply with them?

A. I can't point out to where the specifications said to hookup the washmobile rack—in fact, we had to assemble it ourself.

Q. The washmobile was assembled, was it not, or at least located?

A. Yes, it was located where we figured on—but we assembled it ourself.

Q. You changed the location, did you not?

A. No, just for the water pump—there is about 240 pounds water pressure for that pump that feeds this washmobile.

Q. Did you order Anchorage Installation directly to make the change, or go to Gothberg?

A. I went to Gothberg—and he wouldn't do anything about it.

Q. When did you go to him?

(Testimony of Burton E. Carr.)

A. When I tried to hook it up.

Q. When was that? [287]

A. That was the time they was trying to hook the pump up.

Q. When was that?

A. When we was moving in the building.

Q. Sometime in February?

A. No, it was after the 15th of February, because we moved in there, and it wasn't hooked up —it was quite awhile after that.

Q. Mr. Carr, I hand you a document and ask you to examine the signature, and state whether or not the signature is yours? A. Yes, it is mine.

Q. Would you recite what the document is?

A. Well, it increases the size of the water line.

Q. Don't state what it says—just state what it is.

A. Well, it is about the washmobile—and I had to sign it under protest in order to get into business.

Q. You did sign that order for extra work?

A. I had to do it. They tore all their pipes out before they asked me to sign it—and I didn't have no water around—so what was I going to do?

Mr. Arnell: I wish to offer it in evidence.

Mr. Bell: No objection.

Court: It may be admitted, and marked Plaintiff's Exhibit 12, and may be read to the jury.

(Mr. Arnell then read Plaintiff's Exhibit 12 to the jury.

Mr. Carr: May I ask a question? [288]

Mr. Arnell: Go ahead.

Mr. Carr: Was that $170.00? I believe that check

(Testimony of Burton E. Carr.)

we wrote to Anchorage Installation was $175.00—and we got this check here to Anchorage Installation.

Mr. Arnell: It's right before you, I think.

Mr. Carr: Yes, that is $175.98—and that's what we paid Anchorage Installation, so evidently — I don't understand that. This is the bill and I believe I had the other one at the time; otherwise we would not have paid that.

Q. Now, yesterday, Mr. Carr, you testified regarding the payment of another bill from Anchorage Installation, in the amount of $285.00, I believe.

A. Yes.

Q. Do you recall what that check was in payment of?

A. No, I don't recall what it was in payment of. I know there was—and I say there was one tank for the residence—and the Anchorage Installation was $245.00, I believe, but I don't recall what that was for.

Q. Did you order that work done?

A. I ordered some work done in there for air pipes—but it couldn't be that much money just for putting in two air pipes in there.

Q. Did you testify yesterday it was for change of location of the water line, or something?

A. I don't recall. [289]

Q. What was requested to be done to the air lines?

A. The air lines was according to specifications. They was to be a certain amount of footage of air lines going to the washmobile—and there was a footage of air lines to go to the lube rack. We run down

(Testimony of Burton E. Carr.)

the wall—I imagine the pipe would be approximately 60 to 80 feet, one-half inch pipe—and it wouldn't run that much money at 20c a foot.

Q. Did these air lines run both to the hoist and the washmobile? A. Yes.

Q. And the lines ran, then, through the compressor, did they not? A. Yes.

Q. Were these additional lines required by the change of location of the compressor?

A. From the washmobile to the compressor?

Q. Yes.

A. Well, that would be shorter—the way they are hooked up now than if the compressor would have been down in the basement where it should have been.

Q. According to the original plans, is it not a fact that the compressor was to be along the west wall of the building, approximately in the center?

A. I believe that was supposed to be located in the boiler room—the compressor. [290]

Q. Mr. Carr, would you mind stepping down a moment, please?

What does the top line represent here, Mr. Carr, with reference to your building?

A. Would you point that top line out?

Q. What does this represent?

A. That represents the west wall, I believe.

Q. Would you examine the designations along that wall, there, on the drawing, and state to the jury what you find?

Court: Before you answer that question, I wonder

(Testimony of Burton E. Carr.)

if anybody can say whether the cardinal points of the compass are indicated on the plan. Do you see south, north, east, or west anywhere?

Mr. Arnell: No, your Honor, they are not—not to my knowledge.

Court: The question may be read.

Reporter: "Would you examine the designations along that wall, there, on the drawing, and state to the jury what you find?"

A. Well, well—if you tell me what I am looking for I can point it out to you.

Q. Do you find the location there for the compressor? A. Yes, I do.

Q. Where is it?

A. On the west wall, right in front of the hoist.

Q. Is that the original plan as to the location of the compressor? [291]

A. Well, evidently this is the original plan, but I asked the architect—I wanted that located in the boiler room. Evidently he put it here, but I didn't know he put it here—but where we have got it now, it is really closer because it is sitting right back in here—and all the pipe line and everything to the washmobile are back down in through here—and all these lines go through this wall—and I would say it took less——

Q. Would it be closer, also, to the hoist?

A. Oh, yes—only ten feet.

Q. You had it run around the locker room, did you not, or the chimney?

A. No, we run it up on one wall.

(Testimony of Burton E. Carr.)

Q. And then back down?

A. Yes, just a matter of a few feet.

Q. Did you order this extra work done for the compressor?

A. I believe Gothberg mentioned it—I think at the time he figured it it was supposed to be in the furnace, because he mentioned there wasn't enough room in the furnace—and he would have to build a stage by the stairs.

Q. Did you call Anchorage Installation, or did you call Mr. Gothberg, regarding this particular extra charge for the air lines?

A. Well, the Anchorage Installation—when they was hooking up [292] the air lines up to the top of the compressor, they wouldn't hook the compressor up—and they just ran an air line to the top of the ceiling—and we had to hook it from the top of the ceiling down to the compressor—and Mr. Gothberg wouldn't do that. I went to Anchorage Installation and told them that I wanted that charged to Mr. Gothberg, and they said no—they wouldn't do it—so it is on the bill there for the pipes I bought for the air compressor.

Q. When did you talk to Mr. Gothberg about it?

A. I told him several times I wanted that done.

Q. Do you want to return to the witness chair, Mr. Carr, please? Do you recall when you ordered that work done?

A. Yes, I recall when I asked for the work done.

(Testimony of Burton E. Carr.)

Q. When was it?

A. When was it?—I couldn't tell you the date.

Q. Is it your contention, Mr. Carr, that this was not extra work, but was within the terms of the contract? A. It was partially extra, yes.

Q. What percentage of this $245.00, that you paid, would be extra, according to your contention?

A. Well, when they hooked the air lines up they didn't hook it anywhere near the pump—they hooked it as far as the ceiling—so I told him while he was hooking it up to run them over to the—let's see—that would be to the west [293] wall—to run them down the west wall toward the center, and over across the building, and over to the other wall—and that is just for the extra pipe—to hook it in those two places.

Court: You haven't answered the question, Mr. Carr. What in your judgment, what percentage of this total amount would be considered as extra work, not included in the contract?

Mr. Carr: Two hundred and some odd dollars.

Court: What percentage of that would you consider extra?

Mr. Carr: Well, that would be kind of a hard question to answer—but that amount of that check—I don't know. I don't know if that included some other stuff, but I can tell you this—that two-thirds of the air lines that I ordered—I ordered two-thirds of the air lines, if that would help you out—there's about one-third there, and about two-thirds, I would say, was extra work.

(Testimony of Burton E. Carr.)

Q. I hand you another document, Mr. Carr, and ask you if you can identify it?

A. Is this a price here of $6.70?

Q. No, that is the order number. Does your signature appear on that document?

A. Yes, it does. They wouldn't have got that much money if I knew that was just for the air lines.

Q. Did you sign that work order, then?

A. Yes, I signed that work order—but at the time I signed it, [294] I didn't know it was for that, because they certainly wouldn't have got that much money for about 60 feet of half-inch pipe.

Mr. Arnell: We offer this in evidence.

Mr. Bell: No objection.

Court: It may be admitted and marked Plaintiff's Exhibit 13, and may be read to the jury.

Mr. Arnell: Mr. Bell has agreed to waive reading of it, your Honor. It may be submitted to the jury without reading.

Court: Very well—whatever counsel stipulate to.

Mr. Arnell: Just to speed this thing up a bit.

Court: Is there any amount on it?

Mr. Arnell: $248.07 is the amount of the bill.

Mr. Bell: Object to that—I don't see any such thing on there—maybe it is——

Court: Show it to counsel.

Mr. Bell: Oh, that is an order—24807.

Mr. Arnell: The order number is up here.

Mr. Bell: That doesn't indicate an amount of money at all.

(Testimony of Burton E. Carr.)

Mr. Arnell: It says amount—the amount is spelled out.

Mr. Bell: Well, it will be agreed, before it is shown to the jury, that this writing in here was not here when he signed the order, won't it?

Mr. Arnell: I don't know. [295]

Mr. Carr: It wasn't.

Mr. Bell: So that it won't be confusing to the jury, I ask that that be stricken because that has been put on there since, because it is a typewritten instrument signed by him, and that is in pencil or pen that he says wasn't on there when he signed it. I will object to its introduction unless that is taken off.

Court: Who wrote that?

Mr. Carr: I don't know—because the pipe was 20c a foot and the labor for hooking it up—they wasn't working there more than half an hour.

Court: Now, whose handwriting is that, if you know?

Mr. Carr: I think that probably was done yesterday, or in the last few days, because that ink looks very, very new. I find it here, is all.

Court: Just answer my question. Do you know whose handwriting that is?

Mr. Carr: No.

Court: Is it yours?

Mr. Carr: No.

Court: Or your wife's?

Mr. Carr: Oh, no.

Court: Was there anything of that kind on the order when you signed it?

(Testimony of Burton E. Carr.)

Mr. Carr: No. [296]

Court: Is that your signature?

Mr. Carr: Yes.

Court: The jury will disregard the writing on it—the writing in pen and ink. Mr. Carr signed this and he said it is a work order. It is a work order for extra work, and the date of it—and that is typewritten—and his signature there, of course, should be considered by you—but you should not consider the matter in pen and ink. You said you didn't write it, Mr. Carr?

Mr. Carr: No.

Court: So that is not part of the order at all.

Q. Mr. Carr, if this was not extra work at the time you signed the work order, why did you sign it then?

A. Just like anything else, of course. I am a garage man, but when you order something done, you sign for it that you want it done. You wouldn't know exactly, when you order something, how much it is going to cost—and you sign your name that you want it done.

Q. You regarded it as extra work at the time, or you wouldn't have signed the order?

A. Yes, I knew that was extra work—that wasn't on the contract billed to me direct—not that price, though.

Q. Mr. Carr, how much of the fixtures were you to furnish in this building—the equipment?

A. What kind of equipment? [297]

(Testimony of Burton E. Carr.)

Q. Were you to furnish the hoist?

A. Yes, I was to furnish the hoist.

Q. You were to furnish the compressor?

A. Yes.

Q. And the washmobile? A. Yes, sir.

Q. And all equipment of that nature?

A. Yes, all that.

Q. You testified yesterday that this equipment was all in Anchorage prior to the completion of the contract, is that right? A. Yes, it was.

Q. Where did you have it?

A. I had it down to the Alaska Railroad—it was stored down there at the Alaska Railroad.

Q. Where?

A. At the Alaska Railroad shops.

Q. At the shops?

A. Well, down at the Alaska Railroad. I don't know just where it was—I knew where I picked it up.

Q. Did you pick it up?

A. I don't know whether I picked it up personally, or some of the help—I don't recall.

Q. When did you pick that up?

A. I can tell you approximately about what time —in this manner—the time Mr. Gothberg didn't have the building enclosed, and he had a canvas over part of the door, and the frost was practically about, oh, I would say three or four feet deep on the floor —and we moved them down and it kicked around for quite awhile, and if I remember right, Mr. Gothberg —I hauled it up, so I can prove it was sitting there

(Testimony of Burton E. Carr.)

for quite sometime. And the compressor and all that stuff was hauled down there at the time—I told him I didn't want it put there—I was afraid somebody would tamper with it.

Q. Who did the hauling for you?

A. I don't know if we did it ourselves, or hired it done—I couldn't tell you.

Q. Do you have records that would show that?

A. I would have the records if we hired somebody—I mean if we called the transfer—if we didn't we hauled it ourself.

Q. Would you bring those records in court this afternoon?

A. I have one record here in my pocket. I thought you might ask about that—I will tell you the reason I can't bring them all in is——

Court: We will take a recess. It may be on the table. The jury will remember the admonitions of the Court as to duty, and the court will stand in recess for 10 minutes.

Thereupon, the court at 11:05 o'clock a.m., recessed until 11:15, a.m. o'clock, at which time the following proceedings were [299] had:

Court: Without objection, the record will show all members of the jury present. The witness, Mr. Carr, may take the stand again, and counsel for plaintiff may proceed with examination.

Q. Mr. Carr, in ordering this extra work done directly through Anchorage Installation, did you have any saving as a result of that?

(Testimony of Burton E. Carr.)

A. I don't understand what you mean by "saving".

Q. If you had Mr. Gothberg order the work done, and had him billed directly for it, would he be entitled to charge 10% of that amount, over and above the face value of the bill?

A. I wouldn't know if there would have been any difference or not, but it wouldn't have been that much if Mr. Gothberg did it.

Q. Being an extra outside the scope of the contract, if he had been billed directly for the work he would have been entitled, would he not, to charge you 10% of that amount?

A. Yes, he would—but they billed me for it.

Q. Then you did have the saving of 10% by going direct to Anchorage Installation?

A. I didn't ask them to bill it to me.

Court: So far as I am aware now, the trial of the case will not be continued tomorrow. Other matters have been scheduled that must be taken up. [300]

Mr. Bell: I think, your Honor, we can finish. We have Mr. Rivers, the engineer here, and naturally his testimony will take a little longer than a normal witness.

Court: I merely make this announcement so that counsel won't plan on going forward with the trial tomorrow. When we finish today, we will have to put it over until Monday.

Mr. Bell: All right.

Q. Yesterday, Mr. Carr, you testified regarding some changes in the northeast corner of the build-

(Testimony of Burton E. Carr.)

ing. Would you explain again what changes were ordered by you?

A. I don't recall that question yesterday. What do you mean?

Q. Was the type of construction in the northeast corner of the building changed during the progress of the work?

A. I don't remember just what you mean. You would have to point it out to me.

Q. I believe you testified yesterday that, with respect to the changes to the front of the building, you went up and talked to both Mr. Gothberg and Mr. Anderson about them, did you not?

A. I don't know what changes you mean.

Mr. Bell: Mr. Arnell, to refresh your memory, I believe it was concerning the windows.

Court: Is counsel referring to windows insteaed of wall?

Mr. Arnell: Windows are only part of the wall, your Honor.

Q. Mr. Carr, what was the original design of the north and [301] northeast side of the building?

A. Let's see—the northeast—yes, I remember that now. That was pumice block through there, and then the blocks all froze and they fell out—so as long as they had to be torn out completely, why, we decided to have some extra work in there—putting in two plate glass windows instead of that roll of blocks—and then I changed the gas pump.

Q. Mr. Carr, is it not a fact that the original de-

(Testimony of Burton E. Carr.)

sign of the building, by the use of concrete blocks, would not carry the marquee?

A. Well, yes it would, because we put a heading across there that was extra work—I agree it was—putting the blocks and putting the heading with reinforced steel—that would carry the——

Q. Well, by that, Mr. Carr, do you mean to tell the jury that from the foundation you went up to this beam with concrete blocks or pumice blocks?

A. It was pumice blocks.

Q. And when you say you had a beam across the top, do you mean a lintel of reinforced concrete? That was a reinforced steel beam across the top?

A. That was a reinformed steel beam across the top, yes.

Q. Which, Mr. Carr, was poured first—this lintel or beam that you refer to or the concrete pillars?

A. I believe they was all poured at the same time. [302]

Q. Well, then, the lintel was not in place, was it?

A. I don't know what you mean by lintel.

Q. The concrete beam across the top.

A. I admit that beam across the top, over the windows, that that was extra work that had to be in there to protect the windows, because that was really stronger than the pumice block underneath.

Q. Then did you have to change your design in order to properly support the marquee and make it safe?

A. No, because that was the same deal.

Q. Would the pumice block carry the weight of

(Testimony of Burton E. Carr.)

the concrete slab across the top, as well as the marquee?

A. Well, I will tell you—I am not an engineer and I had an architect to figure that out—and so he would have known on a deal of that kind. I don't know just how much one will take and the other one will take—I wouldn't know, no.

Q. Do I understand your testimony, then Mr. Carr, to be that you admit that all of the changes, with respect to the type of construction, constituted extras?

A. The changes was exceptions there.

Q. What, under your contentions, are exceptions?

A. Well, those blocks was put in there—and naturally I was charged for the amount of blocks that was put in the building. And those had to be torn down—and there should be credit for the amount of labor that he put on that corner—[303] and we had to put in the windows—in fact, they are frozen now.

Q. Is it not a fact, Mr. Carr, that the front of that building was included within the original contract—that is, the $38,000.00 contract?

A. Well, all the building is the $38,000.00 contract.

Q. Well, then, whether the blocks were torn out or not, wouldn't make a great deal of difference, would it, because they were originally included within the general contract?

A. Well, is was included in the general contract—

(Testimony of Burton E. Carr.)

and we paid for the general contract, plus all the extra work of putting this other stuff in.

Q. But the other is definitely extra, is it not?

A. No, because he had to do his work over again. It wasn't good.

Q. Wasn't your testimony, a moment ago, that you changed the type of building, as distinguished from the workmanship?

A. We changed the type of structure.

Q. Well, if you changed the type of structure, it is an extra, is it not?

A. I did tell you that it was an extra—a certain percentage.

Q. I believe, yesterday, you claimed that there should have been some saving as a result of the substitution of glass for block. Is that right? [304]

A. I don't remember.

Q. I understood your testimony yesterday to be that there would have been some saving by reason of the substitution of glass for the blocks. Is that correct?

A. I believe so—for your labor—laying the blocks and all—I believe there would. I don't know if it's right or not.

Q. How much did those blocks out there cost per block to lay?

A. I have no idea what they would cost.

Q. Well, was the going price approximately $1.10 per block, laid in place?

A. I never questioned what it cost for the blocks.

(Testimony of Burton E. Carr.)

Q. What was the cost of glass per square foot at that time?

A. I wouldn't know that either.

Q. Was it $2.75 a square foot?

A. I couldn't tell you—I couldn't tell you what the glass runs.

Q. Mr. Carr, I now hand you Plaintiff's Exhibit No. 9. Would you state—did Mr. Gothberg present a statement to you, Mr. Carr, covering these extra charges?

A. The only time I got that was on March the 4th, 1952.

Q. You had never heard of any charges prior to that time?

A. I probably have, but I never seen nothing like this until that time.

Q. Didn't you receive a progress billing, or notice, as the work went along, or as it was completed?

A. The only thing is we paid him on several occasions.

Q. Were all of the items, listed in this exhibit, Mr. Carr, extras, within your understanding?

A. Well, he has them here down as extras, but it would take quite a little checking to find out if this here really went into the building.

Q. Well, to the best of your knowledge, do the items set forth in that exhibit constitute extras, irrespective of the accuracy of the amount?

A. Well, there is quite a lot on there—some of them I see is all right—others, it is doubtful.

Q. Which one of the items is doubtful?

(Testimony of Burton E. Carr.)

A. Well, something on everything is doubtful—because you know a lot of this thing is cevered up like the steel in the contract. I wouldn't know if that steel is in there or not—sometimes I doubt it—that's what is doubtful—things I can't see.

Q. You can see the items that are set forth in the statement?

A. I can see the items.

Q. Are they all extras?

A. He's got them marked down as extras.

Q. Well, are they all extras, according to your understanding?

A. They are extra, but not according to my understanding.

He's got them marked down as extras, but there is a lot of that that is on the regular contract. [306]

Q. Which of those items is on the regular contract?

A. For instance, the hoist—that's one thing.

Q. What else?

A. Well, about this molding—and some of that molding, I told Gothberg I didn't want it on there—and I wouldn't have it on there—and he put it on anyway. It's homemade stuff—it looks bad—if you change glass you've got to tear it all apart. It is not manufactured stuff that it's supposed to have on there, and I wouldn't pay for that stuff—I don't want it.

Q. What else?

A. There's a number of things.

Court: Go as far as you can identify them. Take

(Testimony of Burton E. Carr.)

them up, item by item, and tell which you think are, and which are not.

Mr. Carr: Number A—the door, that's agreed on; on Capital B—just the two plate glass, but the molding is so inferior I wouldn't agree on it—I didn't want that installed.

Q. Is that the glass that was put into the wall as a result of the change of construction?

A. That's right. And the next item, Capital C—that's all right; and Capital D—relocating the pumps, that's correct. And E—installing two-plunger hoist, that is not correct.

Q. You mean it is not correct as to amount or——

A. No, that's part of the contract to install that hoist. He [307] had a picture of it before he even signed the contract—and he lost the plans and the picture and all—the same as he did his check.

Q. Would you go on with the next item. Mr. Carr?

A. F—increase the height of the glass to seven feet, that's correct, but the labor—six hours—well, that was installing the molding—but installing that molding—I wouldn't pay for that stuff and Gothberg—let's see, that's very doubtful on Capital G there. They didn't spend 62 hours putting that in—I know positively.

Q. What is that?

A. Beam and three-column concrete—five yards, including pouring, lumber, framing, and rods, and buttons, and steel—185 pounds of steel. I don't know

(Testimony of Burton E. Carr.)

if that was in there or not—if there was any steel in there.

Q. Is that concrete beam the one you described that your ordered put in to replace the blocks?

A. That's right—I ordered it put in. Labor—framing—62 hours for just putting in a beam of that size there—about 8 feet—let's see—18 feet—about that high and about so wide—and 62 hours—I think that's out of reason.

Q. Well, the framing includes the posts, too, does it not, as well as the beam?

A. It doesn't say on here about any posts.

Q. Doesn't that statement also show a charge for concrete? [308]

A. Well, you are correct—beam and three column concrete—well, that could be correct, except the steel.

Q. Are there other items on there, Mr. Carr?

A. I would like to see the bill for that steel for that particular date.

Q. Are there any other items on there, Mr. Carr?

A. There is Capital A—credit for one window.

Q. Is there any other credit shown there?

A. Mulls and covers—I don't know what that is, and there's 29 cinder blocks credit—and this glass—I guess that is the glass that was supposed to go in the back door, I believe.

Court: Is that a credit or a charge?

Mr. Carr: Credit. I don't know—is that 29 feet of cinder blocks, or is it 29 cinder blocks?

Mr. Arnell: I think it's 29 feet, Mr. Carr.

Mr. Carr: That's $31.90 for cinder blocks to go

(Testimony of Burton E. Carr.)

into an eight-by-eight wall—there is one front door —that is a credit, and 23 feet of cinder block—another item here, $25.30, too, and 94 feet of cinder block, $102.40.

Court: Are those credits, or charges?

Mr. Carr: Credits.

Q. Mr. Carr, disregarding the accuracy of the figures, is all of the work represented on that exhibit, work that constitutes extras done by Mr. Gothberg, outside of the scope [309] of the contract?

A. It is marked as extras.

Q. Was that type of work done out there?

Mr. Bell: Object. He has answered each piece separately, and answered what was done on the contract, and what was extra. To ask him to answer more questions that contradict his former testimony would be improper.

Court: The objection is sustained.

Q. Mr. Carr, I hand you Plaintiff's Exhibit H, which constitutes the bill for extra work. The first item is enlargement of washroom. Is that a proper extra charge?

A. You say, was that a proper extra charge? Is that the question?

Q. I don't mean as to amount, Mr. Carr, but as to work. Was that work beyond the scope of the original contract? A. This was extra work.

Q. Now, about the extension of the concrete ramp?

A. Wait until I get down that far here. Let's see —that was that ramp in front of the building on

(Testimony of Burton E. Carr.)

the north side—that was extra work—it was ordered extra work.

Q. Did you order that? A. Yes, I did.

Q. Now, the next item is moving iron beam, which is the beam that was located adjacent to the large twelve-by-twelve door; I believe your testimony, yesterday, Mr. Carr, at [310] least I understood your testimony to be, that Mr. Gothberg made a mistake and put the beam too close to the track of the door. Is that correct?

A. I wouldn't say he didn't make a mistake in putting it there.

Q. Did he put the beam, in the first place, where it was fabricated to be put?

A. He put the beam where it was fabricated to put, yes—but the door that he was supposed to have ordered—he said they never shipped him the right door he ordered, and the right hardware for the electric door—so he had to change that beam, there, so the door would work—so that is part of the contract, to install the door.

Q. Isn't it a matter of fact that the specifications called for a twelve-by-twelve door?

A. I believe that's what it was.

Q. The type or make of door was not specified, was it, particularly? It was the size that was established by the specifications?

A. The only thing—I went up to his house and he showed me a picture of different doors that I wanted.

Q. Is it not a fact, Mr. Carr, that the door, which

(Testimony of Burton E. Carr.)

we are talking about, as it was fabricated, was only ten feet from the door and from the wall?

A. As it was fabricated, yes. There are several types of [311] doors that could fit in there that would work without taking them out.

Q. And your door track would have to go about that? A. That is correct.

Q. Is that beam approximately the same height as the top of the door?

A. Approximately twelve feet, the beam is.

Q. Is it possible, Mr. Carr, to get a sliding door of that type, that will run on a track, that is not level at the top?

A. There is all types of doors you can get. You can get doors to run over the top of that—or underneath it.

Q. That is the kind, then, that you wanted him to put in?

A. That was up to him to figure out—he knew the specifications in the contract—and it was up to him to figure out what type of door to order.

Q. Actually, he had to move this iron beam we are discussing back two feet, did he not?

A. Two pulls, and push it back two feet, that's all.

Q. Yesterday, Mr. Carr, you described to the jury the condition of the garage floor; were you there at the time the floor was put in?

A. When it was put in?

Q. Yes.

A. I wasn't there all the time. They worked on it at night [312] time and I stayed there up to about

(Testimony of Burton E. Carr.)

11:00 o'clock one night—and they was working—but it takes a long time to smooth that off.

Q. Working at night on concrete is not an unusual occurrance, is it? A. I know it.

Q. In other words, when it is poured, they sometimes work around the clock, if necessary?

A. That's right. I understand that.

Q. What is the pitch of that concrete floor, Mr. Carr?

A. I don't recall right now. It's supposed to be enough so when water is on the floor, it's supposed to run toward the drains, but it runs away from the drain—some of it might, a little bit, but it runs all over the shop.

Q. Were you there before the concrete was poured?

A. I was there practically all the time, watching them.

Q. How were the strut boards installed?

A. I don't know what that is.

Q. Well, were there any boards used to bring the concrete down to a level pitch, or grade?

A. Well, yes, they had kind of a board—you mean for leveling it off? You mean when I testified that there was a bunch of two-by-four's laying there, and he picked up the straightest one, and used it as a level to sight the floor off? [313]

Q. Mr. Carr, you are familiar with the way a concrete floor is put in, are you not?

A. Yes, I saw them put in—I don't know whether it's right or not.

(Testimony of Burton E. Carr.)

Q. Will you describe to the jury what kind of forms were put in?

A. They just blocked off with two-by-four's all around the place—and then they poured that one section—and when they got that section leveled off, they went to the next one.

Q. How many sections was the floor poured in?

A. I don't recall, but I believe either six or eight, I couldn't recall.

Q. It was not a solid pour, then, for 50 by 100 feet?

A. No, there was around about—I imagine about 25 feet square.

Q. When you refer to a square, now, Mr. Carr, do you mean before the concrete was poured. Two-by-four's, or other boards, were put up so there would be a form for this concrete, 25 by 25 feet?

A. Right.

Q. Do you know how those forms were put in?

A. I don't remember seeing how they put them in. I didn't see that when they were putting them in, except it looks as though they were just laid in there, because they was moveable—because when they was putting this concrete—one of [314] them grabbed one and set it down. How they knew how far that was to be set down, I don't know.

Q. Were those forms or strut boards put in by instrument? A. I couldn't tell you that.

Q. You don't know?

A. I don't know if they was put in by instruments, no.

(Testimony of Burton E. Carr.)

Q. Is there an expansion joint between the concrete slabs, Mr. Carr?

A. Yes, there is one inch expansion joints put in there, which looks very ugly on the floor.

Q. Were those required?

A. They shouldn't be that wide, because when you roll the jack over them, you can't move any car over them at all.

Q. How are the other joints?

A. All over the building that same way.

Q. They are all an inch?

A. They are all an inch, because when they got wet it spread out about an inch or an inch and a quarter.

Q. When you say they got wet, what are you talking about?

A. Well, when they poured one originally, they put that in, and they poured the other concrete to the other one—and a certain amount of moisture caused it to swell.

Q. Do the boards swell?

A. Cellotex is what he used. One-inch cellotex, and I don't believe you are supposed to use cellotex. I believe if [315] you use anything like that, it should be real thin. I never seen any other building poured that way.

Q. Mr. Bell, in asking you a question—as I recall—said the floor was so uneven you would trip over it. Is that correct?

Mr. Bell: Object to that statement.

A. Well, I believe you are taking it a little fur-

(Testimony of Burton E. Carr.)

ther along than what he said. You wouldn't exactly trip over it, but it's wavy—it's in bad shape.

Q. Well, describe what kind of shape it is in, Mr. Carr?

A. Well, when it starts in raining there, we have to have fellows with three or four brooms sweeping water out so they can work—and some of the floor in the boiler room, at least two and one-quarter inches, it even runs out the drain, and you have to use boards to step on to clean out the furnace.

Q. Does that water down in the furnace room stand there all the time?

A. Until we sweep it out into the place it's supposed to go.

Q. How far out of pitch is the floor, Mr. Carr?

A. You say out of pitch?

Court: Out of level.

Q. Out of grade, we will say.

A. I couldn't tell you that. I know when you pour water out, it don't go down the sewer or where it is supposed to. [316]

Q. What do the specifications require as to grade?

A. I couldn't tell you that. I know it's supposed to be a certain grade.

Q. Do you know whether the floor complies, or does not comply, with that grade?

A. Well, it wouldn't comply. He probably got a grade there, but it's so uneven that the water stands and don't run down. It's supposed to be so the

(Testimony of Burton E. Carr.)

water will run off, and it don't do it, so evidently he hadn't got any particular grade.

Q. Does water stand all over the whole floor?

A. No, all over—spots here and there where the fellows are working—and practically everyplace on the floor, except right over the drain.

Q. The water will just stand there?

A. Yes, just stand there.

Court: I think we will suspend now.

Mr. Kurtz: Your Honor, may I ask one question? Mr. Arnell, I believe, asked the witness whether he would be able to furnish some evidence on the dates certain fixtures were delivered on the site. For example, the hoist, and the washmobile, and the compressor, and so forth. I don't believe it was made clear as to whether Mr. Carr is going to furnish evidence on the delivery of the fixtures, and I was wondering what the status of that is? [317]

Court: No doubt you will give us any information you have on that, Mr. Carr. Bring it in this afternoon.

Mr. Carr: Yes.

Mr. Kurtz: I think Mr. Arnell requested him to bring information in this afternoon, but I don't know whether he agreed to do that.

Mr. Carr: I have one piece of paper here with some information on it, and the rest of them I doubt if I can get—I will tell you why. I can prove they was done at the right time, but the compressor, and the hoist, and the lube equipment, and all, is on a Union Oil contract. We leased this material

(Testimony of Burton E. Carr.)
from Union Oil Company, and the bills would probably be in Seattle, or some place, on that.

Court: Would you have any bills?

Mr. Carr: I can just show you where we were paying the lease on it, but I have a bill in my pocket. It is a freight bill for some of the stuff—it was all delivered to the garage at the same time. It arrived in Anchorage on March 4th, 1950, but when it was picked up—it was picked up later than that.

Court: Will you bring in this afternoon, any papers or give us any papers you have yourself, or can secure from the Union Oil Company on the subject, or from anybody else? The trial will be continued until 2:00 o'clock this afternoon, and the jurors will remember the admonitions of the Court as to duty. The court will recess until 1:30, at which time there is [318] another trial before the Court. The court will stand in recess utnil 1:30.

Whereupon at 12:02 o'clock, p.m., the trial of the above entitled cause was continued until 2:00 o'clock, p.m.

Be It Further Remembered, That at 2:00 o'clock, p.m., the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: The witness, Mr. Carr, may resume the

(Testimony of Burton E. Carr.)

stand. Counsel for plaintiff may proceed with examination.

Q. Mr. Carr, is the floor, that we were discussing just before noon recess, cracked, or otherwise shifted out of shape?

A. I don't recollect any cracks, except those ones where they are connected together with about an inch or an inch and a quarter variation—what they call the expansion joint—I believe that's what they call it. If you try to rule a jack over it, it gets caught on there, and you got to give an extra push—it don't go over smooth. We can't use some of our instruments on account of the crack.

Q. Are those 25 foot blocks, that you described this morning, cracked or out of grade?

A. No, the reason it's out of line—when they leveled it off [319] with two-by-four's, they tried to find a straight one, and whenever the two-by-four had a concave, it would show that concave all over the floor.

Q. Are all of those blocks, that you described this morning, in the same condition, or are some of them relatively free of depressions?

A. They all got depressions all the way through.

Q. Are they large, or small, depressions?

A. Large depressions. As I said before, water stands on there and you have to keep sweeping it all the time—and in rainy weather, the mechanics lay their tools down, and they get their overalls all wet—and it's pretty miserable.

(Testimony of Burton E. Carr.)

Q. Is that condition worse in the winter than in the summer? A. Just when it rains.

Q. How about snow and ice? Does that have any effect?

A. The same way with snow—it goes into water and it's all the same.

Q. I believe you testified yesterday, Mr. Carr, that this floor would have to be taken out. Is that correct?

A. To be correct, it would—yes.

Q. Since the building was built, you have sold it, have you not?

A. Yes, I have.

Q. Did you testify yesterday, that you would have to correct the floor, or were you referring to some of these other [320] conditions?

A. I didn't specify which detail I was going to correct. I said the building would be put in the specifications that were called for. It would be put in that condition.

Q. Did you inform Mr. Akers that you would tear out the floor and put in a floor for him?

Mr. Bell: Object as incompetent, irrelevant and immaterial what he told Mr. Akers.

Court: Overruled.

Q. What was your answer to that question, or did you answer?

A. I didn't tell him anything specifically I was going to do, but I told him I would put it to where the building would be up to the specifications of the contract.

(Testimony of Burton E. Carr.)

Q. Did you point out to him these other defects, that you have described to the jury?

A. I pointed out a number of defects.

Q. When you say defects, do you mean deficiencies in the contract, or conditions that you felt that you should complete for this sale to Mr. Akers?

A. The sale has already been made, as I say, but the building will have to be put in the condition to what the contract is.

Q. Is that in writing, Mr. Carr—your agreement with Mr. Akers? A. Yes, it is.

Q. When was that agreement made? [321]

A. When I sold.

Q. Was that February of this year?

A. It was March 1st of this year.

Q. Was that agreement that you have referred to a part of the Real Estate Contract of sale?

A. Yes, it was.

Q. In other words, it was a part of the agreement whereby you agreed to sell the building and the business to Mr. Akers for so much money. Is that right?

A. It was all in one lump sum. It wasn't any specific—so much for the business and so much for parts and equipment. It was all one lump sum.

Q. I mean, what you agreed to do to place the building in this condition you have described, was included in that agreement, was it?

A. Yes, the condition it should have been in when it was built.

Q. Yesterday, Mr. Carr, you described the front

(Testimony of Burton E. Carr.)

window glass as, in your opinion, being unsafe, did you not? A. Yes, it is very unsafe.

Q. Has the glass ever fallen out?

A. Well, could I explain this—I mean, could I explain the way the glass fits?

Q. Just answer my question first.

Court: Has it ever fallen out? [322]

Mr. Carr: It hasn't fallen out yet—no—it's just about to any day.

Q. You made reference, yesterday, Mr. Carr, to the fact that if there was an explosion it would fall out, did you not?

A. It wouldn't take much of an explosion, because it is only resting on two sides—if you look right straight up at the top there, it is all shimmied in—it is hitting about an eighth of an inch on the top to hold that big glass—and the same down below—an eighth of an inch all the way up—and when the wind is blowing that thing vibrates back and forth—and we had to put some braces on the window during that heavy wind last winter.

Q. Mr. Carr, have the concussions resulting from anti-aircraft fire affected that window?

A. It vibrates, yes, sure.

Q. But did the concussion cause those glasses to fall out of the moldings?

A. Well, it vibrates.

Q. You didn't answer my question. Would you answer it please?

A. It depends on how close it would be—it wouldn't cause it to fall out unless it got real close.

No. 13959

United States
Court of Appeals
for the Ninth Circuit.

VICTOR GOTHBERG, an individual doing business as GOTHBERG CONSTRUCTION COMPANY, Appellant and Appellee,

vs.

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(Pages 377 to 775, inclusive)

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(Testimony of Burton E. Carr.)

Q. But did the concussion cause those glasses to fall out of the moldings?

A. No, it didn't cause them to fall out.

Q. Yesterday, you described how the front of the building had [323] fallen away someway, Mr. Carr. Will you go through that again for me, please?

A. Well, the steel down below there—when this was fastened on on the front of the building it wasn't tied properly—and the wires wasn't put in there in such a way I had it explained to me where it should have been—so they wasn't ready for concrete—to pour those pilings for the window frame—and the men working there didn't want the concrete poured yet, because it wasn't ready, and Mr. Gothberg told them to go ahead—and they poured the concrete anyway.

Q. You referred to a bad crack in the wall yesterday. Where is that in relation to the front of the building on Fifth Avenue?

A. I believe it's right over the main window. It's about half or three-quarters from the door—it is cracked all the way down—straight cracks. The building right next to where I live is 20 feet longer, and it is the same height all the way through the building—and I examined that building 2½ years ago—and there is one slight place where you have to have glasses to see it's cracked on that wall—and my building is cracked all over—and that building was built in the cold weather—but it is covered—and that is the paint store right next door

(Testimony of Burton E. Carr.)

to the Church of the Open Door—and I examined that this morning, and one side, I couldn't see any cracks at all—and the one I had is cracked [324] all over.

Q. Where is this store you refer to?

A. Next door to the Church of the Open Door.

Q. On Fourth Avenue?

A. Fourth Avenue—20 feet longer—same height.

Q. It is also built out of concrete block?

A. Pumice block—the same type of block.

Q. To get back now, Mr. Carr, to the crack you have referred to. Does that run up through the bricks, also?

A. It runs right up through the bricks there. I looked inside, and I couldn't see any tied wires in between the blocks.

Q. Has the wall separated from the west wall at the corner? A. It's separated, yes.

Q. It has?

A. All the way from the top clear on down to the window on that corner. It goes like this—here's your window here, and the back windows are here, and here's where the line is, and from the window right on, it is cracked straight through. Also, on the foundation where it was joined, it is cracked there.

Q. That crack is in the center of the building. My question, Mr. Carr, was whether or not this north wall had pulled away from the west wall at the corner of the building?

A. Let's see—well, that is a question I can't answer you. [325]

(Testimony of Burton E. Carr.)

Q. You described the crack that runs up from the corner?

A. That is in the center of the building.

Q. And I asked you whether the walls had separated in the other corner over by the west wall?

A. That is the one I am talking about—the west wall. I can show you on the picture, here, if you would like. It's a lot easier—than I can explain it.

Q. I know where this one crack is. That's at a part of the building where it turns past the gas pumps.

A. There is several cracks all along the whole deal and the blocks are loose in between—just only the weight of the other blocks holding it in place.

Q. Has the mortar all fallen out of those?

A. No, the mortar is loose from the block.

Q. Is that north wall then, out of plumb, as Mr. Cupples testified yesterday?

A. That was the one that they had to tear down.

Q. Well, is the wall out of plumb, Mr. Carr?

A. I didn't put any plumb bob on it, or anything—the only thing I know it is cracked so many places it naturally wouldn't be straight right now.

Q. Do you contend, Mr. Carr, that this one crack, that you have described on the north wall, is the result of construction, as distinguished from workmanship, or vice versa?

A. It is workmanship and construction, both—because a number [326] of other buildings I looked at don't have that many cracks.

(Testimony of Burton E. Carr.)

Q. Is that the result of the so-called settling of the foundation that you have testified to?

A. I don't know exactly. You would have to get an engineer on the job to testify on that.

Q. I believe, yesterday, Mr. Carr, in response to one of Mr. Bell's questions, you said the foundation had sunk?

A. Yes, I remember. That was where he was supposed to connect the new foundation on the old. It wasn't properly connected and it did sink.

Q. Where is that?

A. The wall on the street—towards Denali—on that corner there—that's where the foundation is broken clean off.

Q. How about the blocks above the foundation —are they cracked, too?

A. Oh, yes, there's cracks all along there.

Q. Now, the east foundation was an old job. It was put in by Breeden and Smith a year before, wasn't it?

A. Yes, that was put in by Breeden and Smith a year before, yes.

Q. Now, are there any cracks in the blocks above that old portion of the foundation?

A. Yes, there's cracks in there, but the cause of those cracks is the mortar. It was so cold, and naturally the blocks contracted—then with a little heat they expand, and leave [327] floating blocks. The mortar isn't out, but you can see where it is cracked all around the blocks.

(Testimony of Burton E. Carr.)

Q. Do the cracks on that side also run through the blocks themselves?

A. Yes, but those blocks won't stretch anymore. Concrete block has so much tension.

Q. But those cracks in the blocks have occurred over the whole foundation, is that right?

A. Yes, that was on account of the foundation.

Q. On this freezing, Mr. Carr, do you mean the mortar froze to the block?

A. It was 20 below zero when they put those in—and when they would heat the mortar, and as soon as they put it on there, it would freeze solid —so they would have to try to break part of it off so they could set it down—and some of those blocks —the mortar was supposed to be between a quarter and a half inch, but some of that mortar is at least two inches wide.

Q. Where—could you point it out?

A. I couldn't right now. I could show you very easily.

Q. Did they have to chip the mortar off of the outside of the building later?

A. Is that another question?

Q. Yes.

A. There is a lot of places there that the mortar laps over in [328] different places, especially in the inside.

Q. In order to finish the outside of the building, did they have to go along and chop off the mortar that had come from between the blocks?

A. I think you got me wrong. This wide piece

(Testimony of Burton E. Carr.)

of mortar is in between the blocks. The blocks should be set up closer, but the mortar that's sticking out on the inside, you can see it in different places on the inside and outside of the building, especially around the windows there, or the sections above the windows and doors.

Q. How many places, Mr. Carr, in the walls themselves? Is the mortar two inches thick between the blocks?

A. I couldn't tell you how many places. I have noticed it in different places.

Q. Would you say several places?

A. Oh, yes.

Q. That is between the blocks themselves, as distinguished——

A. The blocks put up against one another.

Q. Did Mr. Gothberg furnish the kick plates that you testified to yesterday?

A. Well, after I called him up about it, about, oh, five or ten times, I guess he finally put part of them on there—not all of them.

Q. As I recall your testimony yesterday, there were two or three lacking? [329]

A. There was quite a few of them lacking. They were lacking on the men's restroom, the ladies' restroom, and the door that goes in between the showroom—and they are lacking kick plates on the outside of the front doors. I don't remember seeing any push plates on them.

Q. About the locks, Mr. Carr, did you put in solid brass locks?

(Testimony of Burton E. Carr.)

A. Yes, solid brass locks. I didn't put them in, but that's the ones I bought—regular front door locks.

Q. Were the ones you bought solid brass?

A. Solid brass, regular store front locks.

Q. Were the others usable, or did you just not like them?

A. Well, yes, we used the others in the office—and we tried to get them working several times, and they wouldn't work on the outside doors when he put them in—and Gothberg was in there several days trying to get them in the office—and he sent a mechanic down there to get them to work—and they finally replaced one of them—and the other one would lock in between the office and the outside—I would have to climb through the window—my wife couldn't get out—and I had to climb in there through the window and take a screw driver and open the door a number of times. I can prove it.

Q. Isn't it a fact that you lost the key to that lock?

A. Yes, there is a lock and key, but the key wouldn't work. I can bring it down and show you. He's worked on it, I don't know how many times, trying to tighten it up. [330]

Q. Yesterday you testified regarding the swinging double door between the showroom and garage?

A. Yes.

Q. Is that the kind of door that's in the specifications—a double door?

(Testimony of Burton E. Carr.)

A. A double door and one swinging door.

Q. The way they are installed, the one on the right hand only swings one way?

A. It only swings one way—and it should be a two-way swinging door.

Q. Did you discuss with Mr. Gothberg the installation of another type of door?

A. I told him, but he said that is all he could get.

Q. Did you accept installation of the door that is there?

A. No, I didn't accept it, but he said he would replace it if it wasn't satisfactory—and it never was satisfactory.

Q. Isn't it a fact, Mr. Carr, that you told him to put that door in there, referring to the one that is there now?

A. No, he put that in himself before I noticed they were already in place.

Q. Yesterday you testified regarding an intermittent motor on the heater, that was located where the partition originally was installed. Wasn't that motor provided by Anchorage Installation at a later date? A. It never was, no. [331]

Q. You are positive of that?

A. Absolutely sure of it.

Q. Yesterday, Mr. Carr, you referred to the door frame and the use of lead. What kind of lead do you mean?

A. It is supposed to be white lead that goes between where you set the door frames in, so the

(Testimony of Burton E. Carr.)

wind won't blow through them. It's supposed to be set in white lead.

Q. Isn't the purpose of white lead to prevent rust and deterioration, Mr. Carr?

A. No, because wood don't rust. It is to keep the air out and the wind—to set them in place.

Q. Actually, white lead was only called for on the floor plate of the door, was it not?

A. No, it was called for where the door opened —those door jambs, or door frames, or whatever you call them.

Q. You say that white lead was not used then?

A. No, there wasn't any used there.

Q. White lead is nothing more than thick paint, is it, Mr. Carr?

A. It's lead that's ground down and mixed with white paint—that's what it is—but it is put on there thick so when you fit the opening, it's good and solid.

Q. Don't you put white lead on with an ordinary brush, Mr. Carr?

A. No, you don't. [332]

Q. Or are you thinking of something else as white lead?

A. No, you use a putty knife. If anybody put in on with a brush, they don't know what they are doing, because it would be so thin it wouldn't do any good.

Q. Mr. Carr, in order to paint the beams with red lead, would they have had to put that on with a putty knife, too?

(Testimony of Burton E. Carr.)

A. No, they wouldn't have to put it on with a putty knife. That is still paint.

Q. White lead is paint, too, isn't it?

A. Yes, but it comes in a different thickness.

Q. Yesterday, Mr. Carr, you testified that the inside of the walls were rough. Is that a condition that exists all over the face of the inside walls?

A. Well, yes, if you look up the stairs in the showroom, you can see plenty of it right there and the parts room—it's all sticking out—you can break it off with your fingers, and you can see right through the block.

Q. How about the walls back in the shop?

A. That's just about the same thing—different places all over.

Q. In other words, it is all about the same?

A. Yes, it's all about the same.

Q. When was the touching up on the outside foundation done, Mr. Carr? Do you recall—the sacking that you described yesterday? [333]

A. Oh, that was done in the spring sometime—I wouldn't know the date. I can find out the date because when this guy that was supposed to do the sacking—he put a ladder on the neon sign and broke the neon sign—and we had to pay that—and we can look on the date of that, and they repaired it a few days afterwards.

Q. Was that this spring or last spring?

A. That was this spring. I am pretty positive that was this spring.

(Testimony of Burton E. Carr.)

Q. Was it done early in the spring, or during the warm weather?

A. Oh, it was done about the time I believe that he laid the lanes in the front of the gas pump. It was about that time, I believe.

Q. Yesterday you testified, Mr. Carr, that the specifications called for finishing both the restrooms. When you say both the restrooms, do you refer to the two in the front of the building, or to the locker room in the back?

A. I refer to both of them—the one in the ladies' restroom and in the men's restroom. The ladies' restroom is finished on the inside—I wouldn't say finished, because there is a hole there. I don't know what it is for, but some light, or something, is supposed to be in there, and it was never put in—and this place where they cut around this door, in fact, I pushed it off with my hand. They cut around that to put in that paneling, and that is the only [334] one that's near finished.

Q. The men's restroom, up in the front of the building, wasn't to be finished, was it?

A. No, the men's was just a rough job—just sewer lines and water lines—that's all that was supposed to be done, but the men's restroom in the back was supposed to be finished up—and it wasn't.

Q. The locker room?

A. You can call it a locker room.

Q. What plans and specifications required finishing material in the locker room?

(Testimony of Burton E. Carr.)

A. It was supposed to be finished in a workmanlike manner.

Q. Was it painted like the rest of the building on the inside?

A. They just painted the side. We painted the blocks ourself. He left the blocks rough.

Q. You testified yesterday that the chimney had to be torn down. Did Mr. Gothberg guarantee the chimney at the time it was laid?

A. Yes, he guaranteed it when it was laid. I knew it was going to have to be torn down—it was put up in a corkscrew way in the first place; also, the blocks we pulled out with our fingers and laid them back in there.

Q. Was the present chimney built in the exact location of the other chimney?

A. Yes. [335]

Q. Is the present one twisted around?

A. No, it is straight.

Q. It isn't twisted like the other one?

A. No. This one goes over like that—I would say maybe an inch out of line.

Q. Is the present one built with flue linings, also? A. Yes.

Q. Are those flue linings bent and twisted, too?

A. When they took those flues apart, I believe some was broken on account of the strain.

Q. Is there any material decrease in the efficiency of the chimney for the purpose for which it was built? A. I don't get your question.

Q. As a practical matter, Mr. Carr, will the

(Testimony of Burton E. Carr.)

chimney still handle the amount of gas, and soot, and smoke, that is put out by the furnace?

A. Well, it's the same size chimney all the way through, as it was in the first place.

Q. Does the furnace smoke, or anything?

A. Oh, no.

Q. In other words, the chimney is large enough, and constructed well enough, so it handles——

A. Yes, the first one did, too, but it would have fell over.

Q. How big is that so-called frozen place in the showroom, Mr. Carr? [336]

A. Oh, it's quite hard to answer that. There's several feet wide, and the length as you come in the door—I forget now—well, it can be seen easily enough—about three feet wide, maybe five or six feet long, as you come in the door on the right hand side—and that's all frozen—and then there is other places along the wall. Of course, they are covered up with paint, now, but this bad place is still rough even though there is six or seven coats of paint.

Q. Is that place that is frozen seven or eight feet long, and three feet wide, or smaller?

A. It would be all right there—in order to do a finish job they would have to come over there.

Q. Might it be even larger than the dimensions I have given you?

A. Underneath it could be larger—it could be much larger.

(Testimony of Burton E. Carr.)

Q. As a matter of fact, Mr. Carr, isn't it less than two feet in diameter?

A. Oh, I would say more than that—quite a bit more than that. Oh, yes, because it's about the full length of that window. You can see it.

Q. Yesterday you testified that the windows in the south wall of the building were all loose and rattling, did you not, Mr. Carr?

A. Yes, I did.

Q. Those are steel frames, are they not? [337]

A. Yes.

Q. Are they set on concrete blocks in the customary manner?

A. I wouldn't know if they are set in the customary manner or not, but I know they are loose all along the top and they put in putty in there to strengthen them.

Q. Can you see daylight around the window frames any place?

A. You did when they was first put up there.

Q. Can you now?

A. I haven't climbed up there for a long time. You can see light through most of the places in the blocks there.

Q. Is that above the concrete beam—the lintel above the window—or is it down below it?

A. Above the beam—and it's down below on the windows on the east side, I believe.

Q. Has the concrete beam, or the blocks, separated there? Is that what you are trying to describe? A. Yes, it is separated.

(Testimony of Burton E. Carr.)

Q. Is there a crack in this block above the concrete beam and up to the roof?

A. Right in that place, I couldn't say.

Q. Well, Mr. Carr, there has been testimony here regarding a heater stove, the pipe of which is run out of the window. Now, that is located fairly close to the eight-by-eight door, isn't it?

A. Right next to it. [338]

Q. Ever since you moved into the building, have you had this stove in that location?

A. Well, we had it in the shop for a long time —and it is a stove that burns its own gas—I mean no smoke goes out of it. That is the reason they have it outside there. We was afraid there was carbon monoxide gas, so we let the smoke run outside.

Q. You testified, also, that daylight could be through some of the blocks. Now, where that situation exists, is it right over this heater?

A. No, that is in a different place altogether—quite away aways from that heater.

Q. How far away from the heater?

A. Well, it is quite aways up above—and then all along the 50 foot length, there are different places you can see daylight all through there.

Q. On the individual blocks, or just over the beam?

A. Yes, that whole thing—that sacking there that he put in evidently didn't have enough steel in it.

Q. Well, when you refer to daylight, then, the

(Testimony of Burton E. Carr.)

only daylight that can be seen is right over this beam, is that right?

A. You can see over the beam, but I don't remember just how many blocks was there.

Q. Now, on the exhaust pipe, Mr. Carr, that goes up through the roof, aren't the pipes and extensions the exact ones [339] that were put in there in the beginning?

A. The ones that are in there now?

Q. Yes.

A. Well, those wasn't put in there until this spring. I wanted Gothberg to put them in—I mentioned it dozens of different times, but he wouldn't put them in—and finally he come down with those homemade deals—but they didn't work satisfactorily. On the manufactured article, they have an electric motor on there, with kind of a vacuum to pull it out.

Q. Isn't it a fact, Mr. Carr, that those pieces were installed at the time when you went into the garage in February of 1951?

A. You mean installed?

Q. Yes.

A. They was not—they was not installed until this spring or toward this spring—rather close to spring.

Q. What is the condition, Mr. Carr, of the east wall?

A. Well, I never walked along there for quite some time. I couldn't tell you the condition now, but I know there is cracks on the inside.

(Testimony of Burton E. Carr.)

Q. That, again, is over the whole foundation?

A. The whole foundation, because frozen blocks were put in.

Q. Are the blocks now so loose they are about to fall out, or fall down, or anything? [340]

Mr. Carr: Do I have to answer?

Court: If you know. If you don't know, say no.

A. I haven't looked at the wall—in fact, I was down there just a couple of days ago. I was down there, and looked at part of the building—that was the first time since we sold out. I don't know the condition of the building today, so I don't know anything about it.

Q. What was the condition at the time you sold the building?

A. There was some cracks, but I don't know how many.

Q. Was the wall apparently in good structural condition?

A. I wouldn't say good structural condition, because a good mechanic wouldn't put that up that way.

Q. How about the south wall?

A. Well, we just got through on that south wall. You mean the one with the beam across, and you can see through it—and it was cracked? That is the same.

Q. Are the blocks there loose, and about to fall out, or still reasonably plumb, and in good condition?

(Testimony of Burton E. Carr.)

A. They would fall out if there wasn't something to hold them down.

Q. What do you mean?

A. Some of that mortar is cracked all the way around.

Q. Did you find some of the blocks cracked right through the middle, Mr. Carr?

A. Probably they do—you know, they won't stretch. [341]

Q. Is there any danger that that south wall is going to fall down?

A. If we had a little earthquake, I wouldn't want to be inside of it. I think it would fall down.

Q. You testified yesterday that one earthquake had shaken that building after it was built, didn't you?

A. Yes, and I noticed quite a few cracks in there, too.

Q. That earthquake didn't shake the walls down?

A. No.

Q. How about the west wall that runs along the property line?

A. That is the one I said it had been a long time since I saw that wall. From the inside, and looking out, I could see light in different places.

Q. I thought we were talking about the east wall at that time. Mr. Carr, why did you wait until the 6th day of May, 1952, to make demand upon Mr. Gothberg to do all this work to restore the condition of the building?

A. You mean to do all this extra work?

(Testimony of Burton E. Carr.)

Q. Yes, that is, the date you served this demand on him, isn't it?

A. You mean the date?

Q. Yes, that was May 6th, 1952?

A. May 6th, 1952?

Q. Yes. A. Could I see it? [342]

Q. Is that notice of demand to meet the terms of contract?

A. Yes, that is the demand to meet the contract.

Q. Why did you wait until May of 1952 to make such a demand, Mr. Carr?

A. I had been after him to finish it up, and he called my residence up the day before we got the jury in here, and wanted to make a settlement. He didn't want to go through court.

Q. Did you say you would pay him $4,000.00, approximately, or did you say, "I will pay you for the extras, too?"

Mr. Bell: I would object to that.

Court: Negotiations for settlement after suit is brought——

Mr. Arnell: If your Honor please, I wasn't asking him about the negotiations. He made some reference to an attempt to negotiate, or something——

Court: I understood counsel, or the witness, to refer to something that was said after the suit was brought—some negotiations concerning a possible settlement of the suit. Such negotiations are not admissible, and even though not objected to, I think the Court should enforce the law in that respect.

Mr. Arnell: I realize that, your Honor. It wasn't

(Testimony of Burton E. Carr.)

my intent to bring out the matter of negotiations.

Court: That answer will be stricken, and the jury will be instructed to disregard where he says he—I assume the plaintiff— [343] called him at his residence and said he wanted to make a settlement. Negotiations after suit is brought are not admissible for the very good reason that men wanting to avoid litigation will waive what they conceive to be their true rights and settle for little, if anything, of what they think is justly due them, so no man should be penalized because he wants to avoid litigation or actual trial of the lawsuit. The question here was why the witness waited until May 6th to serve this notice. Now, he can tell why he waited until May 6th to serve the notice, if he desires to.

Mr. Bell: Your Honor, I believe that as part of his answer he said he kept after him—tried to get him to fix the job.

Court: The reporter will read the last answer.

Reporter: "I had been after him to finish it up, and he called my residence up the day before we got the jury in here, and wanted to make a settlement. He didn't want to go through court."

Mr. Bell: I think that answers the question.

Q. Mr. Carr, was this demand made before, or after, you sold the building?

A. What demand?

Q. The one you have before you.

A. This was made after we sold the building.

(Testimony of Burton E. Carr.)

Q. And also after the suit was started, was it not? [344]

A. Yes, after the suit was started.

Q. Now, when you testified you had been after Mr. Gothberg and told him that if he would do certain things you would pay him, did you indicate you would pay him $4,000.00, or did you indicate you would pay him, also, for the extras?

A. I told him I wanted the building completed the way it should be—and when it was completed, we would pay him.

Q. Did you specify the amount?

A. Naturally we would have paid him if everything was complete and done according to specifications.

Q. You would have paid him all of these extras, too, would you?

A. I would have paid him what we agreed to.

Q. Do you mean the $4,000.00 on the contract only, or do you mean you would have paid him in addition to that for the extras?

A. It would have been less the amount of that $25.00 a day penalty for not having it completed by December the 1st.

Q. Mr. Carr, was not the time of completion extended, with your knowledge and consent?

A. No, it wasn't.

Q. Did you raise any objection, during the course of construction, that it was not being completed on time?

A. The reason it was not completed on time—

(Testimony of Burton E. Carr.)

he didn't have [345] any heat in the building so the men could work.

Court: Just answer the question.

A. We talked to him a number of times on the completion date.

Q. Did you object, though, Mr. Carr?

A. What do you mean by object?

Mr. Arnell: That is all—no further questions.

Court: Any further direct examination?

Redirect Examination

Q. (By Mr. Bell): Mr. Carr, I hand you your exhibit that was introduced yesterday.

Court: The schedule has again been changed for the afternoon, and this case will continue on trial until 4:20 this afternoon. Then we must suspend to take up another case. We are about to take a recess, and ladies and gentlemen of the jury, you will remember the admonition of the Court as to your duty, and the Court will now stand in recess for 10 minutes.

Whereupon, the Court recessed from 2:57 o'clock, p.m., until 3:07 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury to be present. Counsel for defendant may proceed with examination.

Q. Mr. Carr, Mr. Arnell asked you about these two extra walls that were—I presume by the way Mr. Arnell explained it— [346] one would be the north wall and the other the east wall in the boiler

(Testimony of Burton E. Carr.)

room. Did you understand those to be the two walls he inquired about?

A. Yes.

Q. When were they built?

A. They were built the same time the foundation was moved back.

Q. Now, have you considered what would be a fair charge for the building of those two walls built at the same time the other part of the foundation was built?

Mr. Arnell: We wish to interpose an objection because Mr. Carr, throughout the entire case, has said he didn't know anything about construction, so I don't think he is qualified to evaluate the cost.

Court: Overruled.

Q. That one wall, eight-by-twelve, and the other wall, eight-by-eight feet, what would be a fair cost of building those walls, in your opinion?

A. The forms on the outer walls have to be in there, anyway, and they are eight feet deep, so there wouldn't be any extra, except a little extra concrete—but those other two walls—I thought about Thirteen or Fourteen Dollars a yard. I don't know what the cost for that concrete is, but I imagine around $250.00 for the whole deal, figuring what it would cost from the new foundation by setting one [347] back and the other back—in that proportion it would be about $250.00 for the amount of concrete, figured on a percentage.

Q. Mr. Arnell asked you a question about how much the City offered to pay you for moving your

(Testimony of Burton E. Carr.)

building back. I believe you stated something there.

A. $1,310.00.

Q. Did that include the ten or twelve feet of the front of your lot? A. Yes.

Q. And that is all that you have been offered so far?

A. That is all they would pay on that, because they said they could move the foundation back—that I could get it moved at that cost, and that was including the price of the property on the front.

Q. That would be $1,310.00 for the front portion of your lot, plus the extra cost that they had caused by forcing you to move it back? A. Yes.

Q. Now, for what you paid the Husky Furniture Company for doing the walls in the showroom and other places, and such work as that that they did for you, you never charged that back to Mr. Gothberg, did you? You paid that yourself?

A. Yes, I believe I have a check in my book here.

Court: Just answer the question. [348]

Mr. Carr: Yes, I paid it.

Q. Did you charge it to Mr. Gothberg?

A. No.

Q. May I see that check?

A. That is for finishing work in the showroom.

Q. I hand you this instrument, dated February 26th, 1951, No. 1722, and ask you to state if that was the amount and the check that you paid Husky Construction Company for finishing the inside of the showroom and the offices in there?

A. That is correct.

(Testimony of Burton E. Carr.)

Q. And did you pay them any more than that, or is that the total amount?

A. That is the total amount.

Q. What did that cover?

A. It covered all the finishing work in the offices, and the showroom, and the labor and the material.

Mr. Bell: We offer it in evidence.

Mr. Arnell: We object to it, your Honor, on the grounds that it is immaterial. The witness has already stated he didn't attempt to charge it back to Mr. Gothberg. It is not a proper issue in this case. It is not raised by the pleadings.

Court: Overruled: It may be admitted.

Clerk: Defendant's Exhibit L.

Mr. Bell then read Defendant's Exhibit L to the jury. [349]

Q. Now, did you pay out any other money for finishing of that showroom and offices in there to anybody else other that Mr. Gothberg?

A. Yes, we had the painters in there working in there—putting on finishing work—I mean clear varnish.

Q. Do you know how much you paid them, or do you have a check with you?

A. I don't have the check with me. It would take quite awhile to look it up.

Q. Did they work there one day or several days?

A. A couple or three days.

Q. Now, the ceiling that is put on in there—does the ceiling cover the entire building, or only the showroom part? A. Just the showroom.

(Testimony of Burton E. Carr.)

Q. How big a space does that cover, approximately?

A. Let's see. It's about 48 feet on the inside measurement, and then that angle taken off there —and then there's about 24—let's see—about 24 feet —showroom and office.

Q. So it would be about 24 feet by 48 feet, less the corner that's cut off? A. Yes.

Q. Did you pay for the material that was used in putting on that ceiling?

A. Yes, I paid for the block. We have something similar to this—it's got holes in it. We paid for all that ourselves. [350] We had it come up by air.

Q. Who put this up for you?

A. Mr. Gothberg.

Q. And now, who bought the fire board that was used in the partition?

A. I bought that myself.

Q. And Mr. Gothberg put that up for you, did he not? A. Yes.

Q. Now, was the fire wall—the cinder block wall——

A. That was the one that they was supposed to put up, but he led me to believe I was supposed to pay for that—that is the reason I put wood, because he said it would be cheaper.

Q. That was the reason that you went to wood and fire board instead of cinder blocks?

A. Yes.

Q. Now, I call you attention to testimony about

(Testimony of Burton E. Carr.)

the front foundation wall. Mr. Arnell asked you about the settling there. Do you know how deep that wall was actually put in the ground on the front?

A. The original one was—they put it in six feet because the city inspector checked the ground formation, and he made me put it down six feet—that was a City ordinance.

Q. That was the whole wall?

A. Yes, it's probably the same now. [351]

Q. Now, then, Mr. Gothberg put down the second wall in front. How deep did he go with that?

A. He claims three feet, but it couldn't have been three feet, because I dug down about a foot and a half, underneath, when I was inspecting that crack. That is all the farther it was, but he should have put it down three feet from the level of the grade—but he was probably counting from the top, sticking out of the earth.

Court: This subject was pretty thoroughly covered on direct examination.

Mr. Bell: That's right, your Honor, but Mr. Arnell went into it, and I thought he left the matter just a little confusing.

Court: Go ahead.

Q. Are you familiar with the specification that provides that if the City Building Code and the specifications vary, that the Building Code should prevail? A. Yes.

Mr. Arnell: I wish to interpose an objection. That calls for the conclusion of the witness. I don't

(Testimony of Burton E. Carr.)

think he is qualified to make such a statement—Mr. Bell asking which would prevail.

Court: Is it in the specifications?

Mr. Bell: Yes, your Honor, I thought he could tell me where it was and save time. [352]

Court: If it is in the specifications, it is proper to call the jury's attention to it.

Mr. Arnell: The plans impose the burden upon the contract, irrespective of what any ordinance said. If the architect, or Mr. Carr, made a mistake in putting out the plans, that burden can't be placed upon the contractor. He is bound by what the plans call for.

Mr. Bell: The specifications specifically provide—the one initialed by Mr. Gothberg—provide that.

Court: If that be true, Mr. Gothberg, I think, is bound by the specifications.

Mr. Arnell: I think the best evidence is what the ordinances might provide—not Mr. Carr's opinion.

Mr. Bell: I am laying the foundation.

Court: First we must know what the specifications show, not Mr. Carr's opinion.

Mr. Bell: The only reason I asked that question, I thought maybe he could tell me the page of it to save me time.

Court: If it is on any page——

Miss Wise: Your Honor, this morning I assumed that this jury would be released at 3:30 and I made an appointment. I wonder if I could have a call made for me?

(Testimony of Burton E. Carr.)

Court: Yes, if it is a very serious commitment, like seeing a doctor or dentist.

Miss Wise: I don't want to go. I just want a call to be [353] made.

Court: We will suspend and you may make the call, now, while counsel is looking this up. You may go through this door into my room and come back the same way.

Mr. Arnell: May I go into the library just a few minutes, your Honor?

Court: Yes.

Whereupon, Mr. Arnell and Miss Wise left the courtroom and returned.

Court: The trial may resume now. Counsel may proceed.

Q. Mr. Carr, SC9, Building Code, under the specification here, we find these words: "The City of Anchorage Building Codes are a part of this specification. If there is a discrepancy between the specification and the City Code the City Code shall govern." Now, did the city engineer give you specifications, or the inspectors give you specifications, and require a certain depth wall for your building?

A. Yes.

Mr. Arnell: I wish to interpose an objection, because this is the best evidence.

Court: The objection is sustained. The Code may be proof.

Mr. Bell: All right. Exception.

Q. Mr. Arnell asked you about a deposition. Who took that [354] deposition, Mr. Carr?

(Testimony of Burton E. Carr.)

A. This lady here.

Q. And who was the attorney that did the questioning of you on that deposition?

A. I think Mr. Plummer.

Q. Mr. Plummer, was it, or was it Mr. Arnell, do you remember?

A. Mr. Arnell. I get them mixed up.

Q. And that deposition was taken by them, was it? A. Yes.

Q. I see. Now, on this sign post that is referred to, do you know how much was charged to you in that bill. I hand you an itemized statement of January 13, 1951, and ask you to state if that sign post is included in there?

A. Yes, it is.

Q. And will you read the parts that are charged to you there?

A. Extra for sign post pipes, $18.60; let's see—extra for sign post, and underneath it says pipe, $18.60—and then another pipe is $1.23, and plate, $11.60. I don't know what that plate is for.

Q. Now, have you ever disputed that that was an extra, or is it an extra?

A. It is an extra there but—just a moment—no, that's all right—the charge on there would be all right.

Q. Mr. Carr, Mr. Arnell, while inquiring of you, said something about the building next door to yours. How close [355] is that to your building?

A. That is where I live. It's just a lot over from where I live—just on the next street. It is on

(Testimony of Burton E. Carr.)

Fourth Avenue—the one I was mentioning. That is the Laird Paint Store there.

Court: You said next to the Church of the Open Door?

Mr. Carr: Yes.

Q. Is that as tall a building as yours?

A. The same height and 20 feet longer.

Q. The same width?

A. No, it's 25 feet shorter—ours is 50.

Q. Did you examine the walls recently?

A. I examined them this morning.

Q. Is it an older building than yours?

A. Yes, two or three years old.

Q. Was the block laid on that building with heat and canvas over it?

A. Yes, it was laid with canvas and heat.

Q. Can you clearly distinguish the difference of the quality of the wall in that building and that in yours?

A. It is a much finer job. There's only one crack. You have to go real close in order to see it. It's just a short one but that's on the west wall towards the Bay.

Q. Now, in interrogating you by Mr. Arnell, something was said about the structural steel on the site. Now, does [356] the structural steel that was there then and was later erected—that was bought by you outside and shipped up here—was there any part of the marquee in that?

A. No, it wasn't supposed to be.

(Testimony of Burton E. Carr.)

Q. The marquee was in the contract taken by Mr. Gothberg?

A. Yes, the contract for building the building.

Q. Yes, and anything in relation to the marquee, is it your contention that Mr. Gothberg agreed to furnish it, by the written contract and specifications? A. Right.

Q. GC-10, of the specifications, provide for the cleaning up after the work was done. Was that ever done?

A. No, we had to clean that up on the side—and he left a pile of gravel in the back—and I guess that was moved out here awhile back. We moved some of it, but we didn't get it all moved.

Q. How much did it cost you to do the cleaning up down there, approximately?

A. Well, we did it with our own labor, so I don't know—it took about four or five hours for the whole crew. We carried a crew of about 11 when we was operating.

Q. An 11 man crew four or five hours. What was the average wage that you paid those people?

A. They made around $2.00 and up to $3.25.

Q. Would $2.50 or $2.75 be an average for the labor there? [357]

A. Oh, golly, no. The mechanics were drawing more than the others.

Q. What would you estimate the average to be?

A. Maybe $2.85 average, I would say.

Q. And there were 11 of you—and four to five hours?

(Testimony of Burton E. Carr.)

A. I believe there was around about 11 at that time.

Q. Do you figure, Mr. Carr, that that would be $125.40 for that, approximately. Can you figure it?

A. It would run similar.

Q. I see. Now, Mr. Arnell asked you a lot about the connecting of the washmobile, and concerning the check that you paid for $175.00, and the bill that he presented was $170.55. Do you know where the difference of $5.00 came from?

A. I have no idea where that difference is.

Q. You did pay the $175.00 check that you introduced in evidence?

A. Yes. I can look that bill up and bring it down in the morning.

Q. Did you say there was less expense and less pipe used to connect up the washmobile when it was moved to the present designation than it would if it were left in the place mentioned in the drawing? A. Yes, it would cost less.

Q. Now, the air lines to the compressor. Did the specifications [358] provide that those air lines go to the filling station portion of the building in the vicinity where the pump islands were? Do you remember whether the specifications provided that the air lines should go there?

A. That's something I don't remember. I know there was supposed to be two designated points. I believe one, I know, to the lube rack, and either it was supposed to go to the washmobile or the other place—I can't recall without reading it.

(Testimony of Burton E. Carr.)

Q. If the specifications provide that the air lines should be connected to that portion of the building where the pump islands are, for the purpose of filling tires with air, would that require the same pipe to put in there, as provided in the specifications, than was actually used the way you put it in?

A. It would have been a lot cheaper for me if it had been that way, I know, because that was on the other side of the building, and it would have only taken about 20 feet of pipe to do what I wanted to do. I am not so sure if it was supposed to be in that place or not.

Q. I won't take that up now, but I will in the argument. There has been considerable testimony about the use of the plate glass in lieu of a door in the northwest wall—two plate glass. Is there two of those plate glass in that angle wall, or one? [359]

A. There was two—supposed to be in—and we put in two more extra ones.

Q. So there's four in?

A. There's four in now.

Q. How large are those plate glass?

A. Four-by-seven, I believe.

Q. Four feet wide and seven feet high?

A. I believe four—I know seven feet high.

Q. As I understand, there's two more of those glass in there than was originally contracted to be put in?

A. Yes.

Q. In lieu of that, the concrete blocks, or cinder

(Testimony of Burton E. Carr.)

blocks, that would have filled the hole, have been taken away? A. Yes.

Q. What about the north wall—the point that extends directly parallel with Fifth Avenue—was that glass to start with, or was that changed?

A. No, that's glass to start with.

Q. Has there been any particular change made that was ordered by you in that wall?

A. Yes, there was. The glass was just a little taller, was all.

Q. How much taller?

A. I believe six inches is all the difference—I believe that's what it was. [360]

Q. Now, Mr. Carr, did you ever see, or did Mr. Gothberg ever furnish you, the bill for the extra that he claims to have used in that concrete slab over the windows, and the three concrete pillars that were put in in that northwest diagonal wall? Did he ever furnish you a bill?

A. No. I notice here 185 pounds, but I never seen any bill.

Q. Do you know if he used any steel whatever in it or not? A. No, I didn't look to see.

Q. And you couldn't tell, now, could you?

A. No, because it's covered up.

Q. You refer to a 12 by 12 door, in which Mr. Gothberg claims a substantial sum for taking out an iron beam for the hanging of that 12 by 12 door. Now, if the door had come, that you had requested, would it have been necessary to remove that beam?

(Testimony of Burton E. Carr.)

A. No, it would not have been necessary.

Q. As I understand your position, the reason for having to move that beam was Mr. Gothberg's not furnishing the door that was originally ordered for the place? A. That is right.

Q. I see. Now, Mr. Arnell asked you if that strut boards that was used in that concrete, were not set with an instrument. Did you see any kind of surveyor instruments used there in setting those boards?

A. You mean that form that goes around——

Q. The 25-foot slab places.

A. Yes.

Q. Did you see any instrument used in setting those?

A. No, I didn't see any instrument used, unless he used an instrument when I wasn't there.

Q. Were you there most of the day that they were putting in these forms to pour this concrete?

A. Most of the time I was there, because I was anxious to get in the building—I was paying such high rent for it.

Q. Now, the specifications provide—Roman Numeral I-07: "Concrete slab finishes shall conform to the following requirements: Monolithic finish; trowel too hard, dense surfaces, free from trowel marks; slope to drains, true to line, evenly graded, 3/16ths inch per foot, unless otherwise noted." Did you ever order it to be changed in any way?

A. No.

Q. Was it put in that way?

(Testimony of Burton E. Carr.)

A. I don't think so—if it had, it would have drained.

Court: What page is that on, Counselor?

Mr. Bell: It is at the bottom of page marked Roman Numeral I-3.

Q. Mr. Carr, I want to ask you whether or not, when laying the concrete, if this was done: "Protect fresh concrete from direct rays of sun, drying winds and wash by rain, [362] protect from all disturbance until thoroughly hardened. Heat concrete to from 50 to 60 degrees F., when air is below 40 degrees F. Keep concrete above 50 degrees F. for four days after pouring. Do not allow to freeze until thoroughly hardened." Was that done there in laying that concrete?

A. Well, at that time, when he got the last of the concrete in, he had plenty of heat—but for some reason or other, they didn't have windows in front —and he had a canvas around there with boards stuck up—and the wind blew those down and that caused the concrete floor to freeze in the showroom. But the only place it froze in the shop was where the big door was. He didn't have the big door up when he laid the concrete. He had a canvas there, and he took that out and it crumbled right out—he did replace it by the big door in the shop—you can see it.

Q. Do you know how much money you paid for him, other than the $34,672.50? Do you remember how much more you paid to him, or for him?

(Testimony of Burton E. Carr.)

Mr. Arnell: We wish to object to this as beyond the scope of redirect examination. There was no contention of Mr. Carr, in his direct, that he paid any money for Mr. Gothberg.

Mr. Bell: He testified paying that $175.00 for him because they wouldn't do the work unless he agreed to pay.

Mr. Arnell: He said he ordered the work done, and the [363] evidence shows he ordered it done, and he himself couldn't testify whether it was within the contract or without. As a matter of fact, he included in one of the bills some work that had been done at his home.

Mr. Bell: He did not.

Court: It is not proper redirect, but rather than have injustice done, I would permit it, and then counsel for plaintiff can examine into it later.

Q. I want to ask him now, since Mr. Arnell said he admitted that he owed for connecting the washmobile—Mr. Carr, did you testify this morning that that was a proper charge, or extra charge, for connecting the washmobile?

A. No, I told Mr. Gothberg several times I wanted him to hook that up and they finally hooked the pipes—so they finally hooked the pipes and they hooked the wrong pipe. They had all these pipes in the same place, and he wouldn't do anything about it—so I went up there to Anchorage Installation and they said they would go ahead and do it. And they took all the pipe coverings off, and after they got all the pipe out, and it was laying

(Testimony of Burton E. Carr.)

on the floor, he said he wanted me to sign the work order—and I said, "What is that for?" and he said that's on extra work here—so we was going to open in a few days and I had to have it connected, and I knew I couldn't get any other plumber—so I was forced, on protest, to sign it—but he didn't tell me [364] how much it was going to cost at the time.

Q. Did you pay that later?

A. Yes.

Q. Do you consider that as your indebtedness, or is that one of the contentions by you here that you had to pay it, and that it should have been paid by Mr. Gothberg?

A. Yes, and the pipes were never recovered.

Q. Were they ever, up to this time, recovered?

A. Some of them—not to this time.

Court: What was the amount paid?

Mr. Carr: $175.00.

Court: What exhibit is that?

Clerk: E.

Q. Is this the check that you paid to them for that?

A. This is the check I paid, but it wasn't this one that he showed—it was another bill—that was $170.00. There was some bill—$170.00—I would like to look up the actual bill and see just what this was for.

Mr. Bell: There was another exhibit.

Mr. Arnell: Exhibit 11 or 12.

Court: 12 is an order for the washmobile.

(Testimony of Burton E. Carr.)

Q. I hand you Plaintiff's Exhibit 12, and ask you if this is the statement you asked for?

A. Yes, that is the one I asked for. I don't know —I don't understand it unless there is something added on to it— [365] this is marked $170.55, and it looks like it was made in the last day or so. I don't know exactly what it is.

Q. The amount you paid was $175.98?

A. Yes, this is a work order—this isn't a bill.

Q. I wanted to ask you about the cost of fixing this neon sign that was broken by one of his employees.

A. I don't remember what that is now—but we have the bill over there.

Q. Do you have the bill here in the courtroom?

A. I think so—I am pretty sure it would be over there, or else it's at home.

Q. What sign company fixed it—do you know?

A. I believe that was Alaska Neon.

Q. I will come back to that. Now, Mr. Arnell asked you if you didn't know that white lead was just a paint that you use with a paint brush. Do you know what white lead is?

A. I have done quite a little painting and automobile painting, but it is a putty you use for putting in between those door jambs—a white lead putty.

Q. Is that a semi-thick substance?

A. Yes, you put it on with a putty knife. It's heavy.

Mr. Bell: I think that's all.

(Testimony of Burton E. Carr.)

Court: Counsel for plaintiff may examine. [366]

Recross Examination

Q. (By Mr. Arnell): Mr. Carr, what's the size of the boiler room—outside dimensions?

A. I couldn't tell you that right now. I wouldn't have the least idea.

Q. If the plans said 17 by 14 feet, would that be right? A. No, I don't think so.

Q. How deep is the excavation below the surface of the ground?

A. It looks like it's about eight feet inside.

Q. The excavation, itself, is down below that?

A. Oh, yes.

Q. Is this $250.00 figure you gave us what you would like to pay, or is that an estimate of the cost?

A. Well, he asked me just what I thought, and I just give him an estimate. Now, I may be off on that—it was just an estimate. It may be quite a bit less or quite a bit more.

Q. Do you mean to tell the jury you can get a 17 by 14 basement, plus the boiler room and stairs for $250.00?

Mr. Bell: I never asked him about a 17 by 14 boiler room because I never thought there was a boiler room.

Mr. Arnell: It is on the plans, Mr. Bell.

Court: The 17 by 14 may be left out of the question. He hasn't admitted that the specifications provide for a 17 by 14 boiler room. The specifica-

(Testimony of Burton E. Carr.)

tions are in evidence, and counsel can argue it to the jury.

Q. Mr. Carr, did you testify the City had agreed it would cost [367] you $1,300.00 to move the building back?

A. Well, the way the City agreed to it—we appointed a man and the City appointed a man—and the two of them appointed one, and they decided what it would cost to move the building back was $1,310.00, including the land.

Court: The City would take twelve feet of land, and that was all included in the $1,310.00?

Mr. Carr: That's what they offered me.

Q. You mean the City offered to pay you that recently, is that right? A. Yes.

Q. And you refused it, did you not?

A. I was out of town at the time.

Q. What, Mr. Carr, did you ask the City for in the first place?

A. I don't know if there was any price. I believe we mentioned about what Mr. Gothberg charged us for it. I am not sure, though.

Q. Approximately $4,000.00, plus the value of the land?

A. I couldn't say for sure. It seems as though we talked about it previously.

Q. Did you ask them $12,000.00 for the value of the land, and the loss of the work that you had already invested?

A. Would you ask that question again?

Q. Did you ask them as much as $10,000.00 for

(Testimony of Burton E. Carr.)

the loss of the [368] land, and the value of the building you had already put up?

A. No, there was quite a little charge more than that, I believe, for the simple reason they kept me from building. They had been offering me to build this place for a year, and I was paying my rent for about a year and five months.

Q. You asked for more than $10,000.00, is that right? A. For what damage it was doing.

Q. Now, Mr. Carr, were these plans and specifications, which are in evidence here, submitted to the City for their approval?

A. I don't remember. You will have to ask Mr. Bell.

Q. You did get a building permit from the City based upon these plans and specifications?

A. Oh, yes.

Q. Is there any steel in the marquee, as such, Mr. Carr? A. Any steel in the marquee?

Q. In the marquee construction itself?

A. Well, I know there is steel there, but I don't know just how much.

Q. Where is the steel in the marquee?

A. It is right there in the building at Fifth and Denali.

Q. Are you talking about the steel beam that is at the inside end of the marquee?

A. Well, there is steel there, and there is a steel pipe that [369] goes through there on the sign—and another steel there that holds up a piece of timber —and quite a bit of steel in different places.

(Testimony of Burton E. Carr.)

Q. Is that the steel you contend Mr. Gothberg should furnish? A. That's part of it.

Q. Did that sign have any effect on either of the steel beams, Mr. Carr?

A. Any effect? I don't know just how that is hooked up.

Q. Is it not a fact, Mr. Carr, that one of the beams had to be reinforced because the heavy sign post was attached to it?

A. That is some of that material that was on the sign post that we paid Mr. Gothberg for already.

Q. You mean the extra material on the sign post was used to reinforce that beam?

A. The sign post and the material which reinforced that—that has already been taken care of—it's been paid for.

Q. When?

A. By check there. On one of those large checks, because it's marked right on there.

Q. Was that all that was necessary, Mr. Carr, to use in connection with reinforcing this one beam that I am talking about?

A. I wouldn't know about that. The only thing I know I furnished so much steel, and he was to furnish the rest [370] of the material and steel to build the building.

Mr. Arnell: No further questions.

Redirect Examination

Q. (By Mr. Bell): I found this neon sign deal. I hand you a statement from Alaska Neon Engi-

(Testimony of Burton E. Carr.)

neering Company, and ask you to state if that is the bill that was occasioned by reason of the defendant's employee breaking the sign there?

A. Yes.

Q. Did you pay that? A. Yes, we did.

Q. How much?

A. $18.00.

Mr. Bell: I offer the statement in evidence.

Mr. Arnell: May I ask a question, your Honor?

Court: If it has bearing upon the admissibility of the document.

Recross Examination

Q. (By Mr. Arnell): When was the finishing work done that resulted in this particular damage, Mr. Carr? I believe you testified earlier it was in the spring of this year.

A. The spring of the year, yes.

Q. As I recall your testimony, Mr. Carr, you said that that sacking and the finishing work outside was done in the [371] spring of this year?

A. I believe it was.

Q. And it was when that fellow was doing this work that this was broken?

A. Whenever he was sacking—it was when this steel come. You can check that in your own records.

Mr. Arnell: No objection.

Court: It may be admitted and marked Defendant's Exhibit M and may be read.

Mr. Bell then read Defendant's Exhibit M to the jury.

(Testimony of Burton E. Carr.)

Redirect Examination

Q. (By Mr. Bell): Mr. Carr, about what date did you sell your business, and everything, down there?

A. March the 1st.

Q. Of this year?

A. Of this year, yes.

Q. So then the sacking was done last year?

A. Evidently it was last year, yes.

Q. Now, Mr. Arnell asked you if you did not agree, or did not waive any objections to the time that your building was being done——

Mr. Arnell: If your Honor please, I didn't make any such statement. I asked him if he objected. I think Mr. Bell should recall that phraseology. [372]

Mr. Bell: I will agree.

Mr. Arnell: Don't misquote me.

Mr. Bell: I didn't intend to, Ed.

Q. Mr. Arnell asked you if you made any objections to the time the building was being fiinshed?

A. Yes, I made quite a few objections on account of I wanted to get in there as quick as I could.

Q. I will ask you to state whether or not you were paying rent on another building at that time?

A. $600.00 a month.

Q. Where was that building?

A. Fifth and East "H."

Q. And did you pay rent on that building from December 1st, 1950, until you moved out of that building?

A. Yes, I had to move out the 15th.

(Testimony of Burton E. Carr.)

Q. Do you remember about the date you moved out of the building?

A. February 15th—I had to vacate then.

Q. Then did you pay December, January and half of February rent? A. Yes.

Q. And that would be $1,500.00, is that right?

A. Yes, that would be about right.

Q. Did you have any other losses by reason of not being able to get into your building? [373]

A. Well, the big loss was waiting after we did get in the building—the big loss was getting our stuff in there. If the building had been ready, we would have been able to work the men and mechanics, but we had to pay the mechanics in order to hold them. And then loss of time when the building was not completed—the door was not up—there was just a canvas on the door—the door was up but not working.

Q. Could you put your whole crew to work after you moved in on the 15th?

A. No, we couldn't do any work at all.

Mr. Bell: That's all.

Recross Examination

Q. (By Mr. Arnell): Mr. Bell has asked you, Mr. Carr, when you went into possession. Now, I will ask the question a little differently. When was the completion required under this $38,000.00 contract? A. Well, it isn't finished yet.

Q. Well, I mean substantially completed, except for the extra work, so that you could have moved in.

(Testimony of Burton E. Carr.)

A. Well, I really couldn't have moved in because I couldn't get my parts department, and parts bins, and stuff in there. The carpenters was building that straight wall and putting those other walls in. [374]

Q. Was that part of the work that was done by Husky Furniture?

A. Part by Husky Furniture—and part on the $38,000.00 contract—and part for the extra work. But that coud have been done quite sometime before that, while they was waiting around there.

Q. Was the work that was being done on the parts room and the show room part of the original $38,000.00 contract?

A. That one wall was.

Q. Do you mean they were just putting in the partition at that time?

A. They had to put in the partition before they could do the rest of it.

Q. As a matter of fact, wasn't that work done on or about January 13th of 1951, Mr. Carr?

A. You mean on the show room in back?

Q. No, I mean the work that was required under the $38,000.00 contract.

A. No, he didn't have all of his work complete, because he didn't even have the door up there—he just had a canvas over the big door, and we couldn't leave anything in there.

Q. I thought you said, a little while ago, Mr. Carr, that at the time the floor was poured, he had plenty of heat in there.

(Testimony of Burton E. Carr.)

A. He had a canvas when the floor was poured. He had heat from the furnace room, but the canvas was covered over, [375] and we couldn't move our stuff in.

Q. I have no further examination questions, but do you have the documents that you agreed this morning you would produce this afternoon, regarding the delivery of the hoist and pumps, and all those things ?

A. Yes, partially—that's the reason it made me late.

Q. May I see those, please?

A. Yes, they arrived on the Alaska Railroad—and on December—it looks like the 15th—for the lift, and the air compressor arrived in Anchorage December the 4th—that is the same bill there—when it is marked paid is when I picked them up—they were all hauled at the same times.

Q. When you say they are marked paid, that is the date you picked them up? A. Yes.

Q. You then picked the hoist up from the Alaska Railroad, and hauled it to the garage?

A. Yes.

Q. And the same on the compressor?

A. Yes, but they were there previously.

Q. Both shipments, though, Mr. Carr, were consigned to you, were they not—Mr. Burton E. Carr?

A. Oh, yes, both consigned to me.

Q. And you picked up the various items that are represented on the date stamped "paid" on each of them, is that [376] correct? A. Yes.

(Testimony of Burton E. Carr.)

Mr. Bell: I have no objection to their being introduced.

Mr. Arnell: I shall offer them now.

Court: They may be admitted, and appropriately marked.

Clerk: Plaintiff's Exhibits 14 and 15.

Court: Which is 14? What does that relate to?

Clerk: The compressor.

Court: And 15 to the hoist?

Clerk: Yes. It's called an auto lift.

Mr. Arnell: Mr. Bell, do you desire the exhibits be read, or will you waive that.

Mr. Bell: I would like them read, including the date of shipment, please.

Court: Just read the dates and the stamps put on, received, and so on.

Mr. Arnell then read the exhibits to the jury.

Court: We will suspend the trial now, until next Monday morning at 10:00 o'clock. The jurors will remember the admonition of the Court as to duty. You are now excused, to report next Monday morning at 10:00 o'clock.

Whereupon at 4:20 o'clock, p.m., September 25, 1952, the trial of the above entitled cause was continued until 2:00 o'clock, p.m., September 29, 1952.

Be It Further Remembered, That at 2:00 o'clock, p.m., [377] September 29, 1952, the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties

(Testimony of Burton E. Carr.)

being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: I think Mr. Carr was on the stand when we closed. He may resume the witness stand. My notes show that counsel for defendant was pursuing redirect examination.

Mr. Bell: I think that's right, your Honor—that is the way I remember it.

Mr. Arnell: As I recall, your Honor, I had finished.

Court: Yes, it was on redirect.

Redirect Examination

Q. (By Mr. Bell): Mr. Carr, I hand you a paper—a statement from Husky Construction Company. I will ask you to examine that and state whether or not that is a statement of the work they furnished there?

A. Yes, there is $1,434.90. It's plyboard, and all the finishing work inside the garage, in the show room, and all the offices—that was all the material in the whole thing. And the labor was $1,290.50—and that included installing all the plyboard, and all the white birch all the way around the building, inside the offices and outside, and included [378] all the counters—all the glass counters—and all the glass blocks underneath—and the whole works. That's $1,290.50.

Q. That $1,290.50 was for labor? A. Yes.

(Testimony of Burton E. Carr.)

Q. Is this statement representing all the work the Husky people did for you at that place?

A. All the work, yes.

Mr. Bell: I offer it in evidence.

Mr. Arnell: We make the same objection, your Honor, that we made to the admission of the check.

Court: What was the objection?

Mr. Arnell: That it was immaterial and irrelevant.

Court: Why?

Mr. Arnell: Because this is extra work, beyond the scope of any of the contract. Mr. Carr has testified it was extra work done by the Husky Furniture Company.

Court: What has that to do with the case, Counsel?

Mr. Bell: We want to show who really did the finishing.

Court: Well, the contract didn't provide that the plaintiff should finish the building.

Mr. Bell: No, it did not. But one of these causes of action is extra—over $5,000.00 for finishing the office and building inside, and this is to show who really did do the work. [379]

Court: Is it your claim, Mr. Carr, that this is work that Mr. Gothberg contracted to do under his contract?

Mr. Carr: No, this is not under the contract, but it was a difference between—his labor was so much higher—just for this rough work—and this is finished work. Mr. Gothberg just botched it in

(Testimony of Burton E. Carr.)

with two-by-four's, and there was a $5,000.00 bill on that—and where this was all finished carpentry work, which is much harder work, that is the reason we brought that up.

Court: I don't think it is admissible or relevant.

Mr. Bell: Your Honor, you would be absolutely right, if it wasn't for this reason: If Mr. Gothberg claims $5,800.00, I believe it is, for the finishing job of this office and show room, then we should show—the jury is going to inspect the building, I presume, and there is some fine work done there—nice work that was done by Husky Furniture, and for that reason we want to show that that was paid for separately, so it will not be confused with what Mr. Gothberg did. And for that reason, your Honor, was the reason we put the check in, showing that he paid Husky Construction Company $2,725.40. Now, this is the bill that itemized that. It says wainscoting, and weltex counter, cash register, stand and window shelves, and so on, and it itemized that check that was put in by consent.

Mr. Arnell: It wasn't by consent, Mr. Bell—no, sir. [380]

Mr. Bell: I may be wrong.

Court: I was under the impression that the check represented work done by the Husky Construction Company, that Mr. Gothberg should have done, and did not do.

Mr. Arnell: I objected to the check. As I remember the ruling of the Court was that it would be admitted for the time being, with the indication

(Testimony of Burton E. Carr.)

that a final and definite ruling would be made on it before the case was presented to the jury.

Court: The objection is sustained, and the ruling of the Court, admitting the check in evidence, is set aside, and the order is that it not be admitted in evidence or go to the jury. This may be marked for identification, Mr. Bell, to make it part of the record, of course.

Mr. Bell: All right, and of course we would like an exception.

Q. Now, Mr. Carr, you heard Mr. Gothberg testify to an extra for moving and connecting the pumps in the island? A. Yes.

Q. Now, I hand you some papers that are fastened together, and ask you to examine them and state what they are. Haven't I got too many fastened together? Something that refers to another matter? A. Yes.

Q. Which is the ones that refer to the pumps only?

A. This here is just the material, is all, for the [381] pumps—$73.85.

Q. Did you pay for that?

A. Yes, we did, yes.

Q. What date did you pay for it?

A. May the 9th—it was billed in April 30th, and we paid it May the 9th.

Q. What year?

A. In '51. That is the second relocation of the pumps. First we changed the relocation, and there is a second relocation, and Gothberg has charged

(Testimony of Burton E. Carr.)

for relocating—I don't know how much labor he has us charged for, but we paid for all the material.

Q. Does that check and statement show that it is for material? A. For material, yes.

Court: Is it your claim that Mr. Gothberg should have stood all that expense?

Mr. Carr: No, it isn't. He billed us for relocating the pumps the second time—and here is where we show we paid for the material—and he is billing us for the material and the labor, as I understand.

Court: In other words, it would be a double charge?

Mr. Carr: Double charge—and here is where we paid for all the material to the City Electric.

Mr. Bell: We now offer it in evidence.

Mr. Arnell: If your Honor please, we object to the offer [382] upon the ground that no proper foundation has been laid. I think the direct testimony of Mr. Gothberg was that, to his knowledge, the pumps had been moved three times. Now, at a date subsequent to the date the contractor surrendered the building to Mr. Carr, this same type of work was done again. There is no showing that this was not work that might have been ordered at a subsequent date, even though the pumps had never been moved prior or a dozen times.

Court: The witness, as I understand his testimony, says it was Mr. Gothberg's job to take care of this matter, and how he himself had to do the work that Mr. Gothberg should have done. Isn't that correct, Mr. Carr?

(Testimony of Burton E. Carr.)

Mr. Carr: Well, you see the pumps was put in in the first time by Mr. Gothberg—and on account of changing the front end of the building, after the blocks were all frozen, we had to put a different front on the building, and move the pumps to the side here. And Mr. Gothberg has a bill charging me for moving those pumps, and I believe there is some material—but we are paying twice on this deal.

Court: Is Mr. Gothberg to blame for it?

Mr. Carr: If he's charged us for material for moving them pumps. That should be knocked off because we paid for the material ourselves. We have a check from City Electric.

Court: The objection is overruled. It is up to the jury to solve this, upon the conflicting evidence.

Clerk: Defendant's Exhibit O.

Court: It may be read to the jury.

Mr. Bell then read Defendant's Exhibit O to the jury.

Q. Mr. Carr, I hand you a check and statement from the Anchorage Installation Company, and ask you to examine them and state——

Court: I think Mr. Carr wants to bring some matter to your attention.

Mr. Carr: I thought that was all material. I didn't know they charged for labor. Mr. Gothberg charged for labor and material, and that is labor and material here. We paid Anchorage Installation for moving the pumps. I thought it was just material.

(Testimony of Burton E. Carr.)

Q. Then it does contain labor and material for moving the pumps? A. Yes.

Q. Now, would you tell us what that one is?

Mr. Kurtz: Is that to be given a letter?

Court: Yes—O. And Mr. Carr says now it includes labor and material. Previously he said that Mr. Gothberg had charged for the material, too. Now he claims it covers both labor and material. Is that right, Mr. Carr?

Mr. Carr: That's right. I didn't know it until he read it. There is something else with this, too, isn't there? Have you got something else? [384]

Q. Here is another paper, that was with that group of papers. Maybe that has something to do with it.

A. Oh, yes, this here is labor and material for $27.25—that was paid the Anchorage Installation Company. Then there is a note here on the bottom. It says: "Note—this valve damaged by employees of the garage. This work chargeable to the establishment as it was not a case of faulty original installation." What happend here—when the spring thaw come along, instead of putting this cutoff valve down, according to the City ordinance, down under the paving where you could shut it off, they installed it about four feet on the wall—and naturally, the frost come through and froze it up. And water spread on the inside of the wall so the men at the garage had to take all this plyboard from the wall. The cause of it was this valve was frozen and broken, and they tried to shut it off, and they claim

(Testimony of Burton E. Carr.)

it isn't faulty installation—but it was. That is the reason we tried to turn it off, because it was leaking —frozen and broken.

Q. And that is the check and statement for repairing that particular thing?

A. Yes, and then there was another bill. I forgot about this one—it happened again. It was around $20.00 that we paid, I believe. It was another plumbing outfit when it broke the second time, but they charged us $20.00—but I was out [385] of the City at that time, so I forgot about this here. It was broken the second time, but we can't use it—it's cut off altogether. It's plugged off, and we can't get any water for cars on the outside of the building.

Q. Is it still that way?

A. Yes, yes,—we got it cut off so there is no water in it now.

Q. The reason you got it cut off is if you had turned it on, it would freeze?

A. It would freeze and flood everything.

Q. Is that check issued from your building fund?

A. No, this it not from our building fund. We had two funds, a building account and our regular business account, and this here is from the business account.

Q. But it was paid for by you?

A. It was paid for by us, yes.

Mr. Bell: We now offer in evidence all three of these papers as one exhibit.

(Testimony of Burton E. Carr.)

Mr. Arnell: No objection.

Court: Without objection, they may be admitted and marked Defendant's Exhibit P, and may be read.

Mr. Arnell: If your Honor please, we waive reading of them unless Mr. Bell would like to.

Mr. Bell: I would rather read it.

Mr. Bell then read Defendant's Exhibit P to the jury. [386]

Court: I think we will take a recess at this time. Ladies and gentlemen of the jury, you will remember the admonition of the Court as to your duty. We will stand in recess for 10 minutes.

Thereupon, the court at 3:05 o'clock, p.m., recessed until 3:15 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present. The witness may resume the stand and counsel may proceed with examination.

Q. (By Mr. Bell): Mr. Carr, I hand you a check dated March 15, 1951, to which is attached some papers. Will you explain to the Court and jury what those are?

A. This is a check of $17.25, and there was quite a lot of holes around the outside of the building, and I asked Mr. Gothberg to get that graded off, but he didn't do it, and I had to fill the holes so nobody wouldn't break their leg. That's for gravel.

Q. Who did you buy that gravel from?

(Testimony of Burton E. Carr.)

A. Anchorage Sand and Gravel.

Q. Is the check payable to Anchorage Sand and Gravel? A. Yes.

Q. Was it paid by you in the regular course of business? A. Right. [387]

Mr. Bell: We offer that in evidence.

Mr. Arnell: If your Honor please, I don't want to appear to be attempting to keep anything from the jury, but I think this is part of Mr. Bell's case on direct. I cross-examined Mr. Carr at some length the other day, and now Mr. Bell is attempting to introduce evidence which should have been introduced the other day. On that basis I am basing the objection.

Mr. Bell: Your Honor, you will remember, I believe, that Mr. Carr stated he had some other checks he hadn't found yet, and he did dig these up since then.

Court: It really doesn't matter. I think it would be admissible sometime, and we may as well take it in now. It would have been admissible upon direct. At any rate, the objection is overruled.

Clerk: Defendant's Exhibit Q.

Court: The check is payable to whom?

Clerk: Anchorage Sand and Gravel.

Court: In the amount of how much?

Clerk: $17.25, dated March 15th, 1951.

Mr. Bell then read Defendant's Exhibit Q to the jury.

Q. Mr. Carr, I hand you a group of three checks, and three bills, that are fastened together.

(Testimony of Burton E. Carr.)

I will ask you to state if they represent the same transactions, or are part and parcel of the same transaction?

A. Well, these three checks—they don't include all these three [388] checks. What we are interested in—those three checks—it was given in three different checks, but it was for $80.96. That's for 11 pieces of asbestos board that Mr. Gothberg should have put in in the fire wall. We had to buy it and pay for it.

Q. Is that part of the extras he has charged you for? A. Yes.

Q. And you paid for it yourself?

A. Right.

Q. Do you know what the other purchases are for, besides the asphalt board?

A. Yes, this here is tile board. You see, that's in on these checks here, but that's on our own. That's tile board we had in the ceiling, and then there's some plyboard here. I don't recall just what that is, plyboard—$37.44—three pieces, but I don't recall just what that was for.

Q. Was there plyboard used in that partitioned wall that Mr. Gothberg put in?

A. It was delivered down there—evidently it is. That would be January 5th—what it was used for, I don't recall.

Q. As I understand, the only thing that you bought, and know is a double charge, for the fire board, or asphalt board? A. Rght.

Q. Is the asbestos board separate? [389]

(Testimony of Burton E. Carr.)

A. The bill is separate. It is on the regular invoice here, and then it is on the regular bill here. But they are in with the checks. There's quite a number of checks here, but when they billed this out—I don't know how she happened to pay for it that way.

Q. Can you separate it so it will be one exhibit that will be clear to the jury?

A. Well, the one check for $118.40—that included the $80.00. I don't know how she's got that.

Q. Well, were all of those purchased during the month?

A. Yes, we had the bill here paid—and all we are claiming here is $80.96.

Q. And you don't know about the others?

A. That $37.00 deal—I don't know. I don't know what that plyboard was used for, but it was delivered down there. If it was delivered to Gothberg, and they sent the bill to us, I couldn't say.

Q. And you paid for it?

A. Yes, we paid for it. We couldn't find any other dope on that.

Mr. Bell: Ed, do you object to having all three go in or would you rather I would sort them the best I can?

Q. I will ask you this question before I offer them. Was all of that material purchased from the same people, the Ketchikan Spruce Mills? [390]

A. I believe so, but tile board is on one. You see, part of the time we had another office girl down

(Testimony of Burton E. Carr.)

there, and we've got some of that stuff mixed up, but it's paid for in those three checks.

Court: Is there objection?

Mr. Arnell: We wish to renew our objection, your Honor. There are several statements in here, one of which is for acoustical tile, that Mr. Carr testified he had to furnish himself.

Mr. Bell: He said he did.

Mr. Arnell: There is no showing, your Honor, that this is for material that was used by Mr. Gothberg, or that he should pay for it.

Court: Mr. Carr just testified the asbestos should be charged against Mr. Gothberg, and it is $80.96. Now, if this can be separated from those papers, it may go in, even though the check is a larger amount. The jury may remember that $80.96 is charged against Mr. Carr, that had to be paid by Mr. Gothberg.

Q. Mr. Carr, I hand you a check for $399.00, as being the first dated check for February 5th, payable to Ketchikan Spruce Mills, and ask you if the $80.96 was included in that check there?

A. No, I believe the $80.96—I think you could take that, and take $37.00, and I think they will make about $118.00. [391] I believe it's in the $118.00 check, but I produced a bill from this company with this marked "paid."

Q. You did pay it, did you? A. Oh, yes.

Q. I will show you this other check——

A. It's in this check here, I am almost positive, but I can get them to mark it paid down there.

(Testimony of Burton E. Carr.)

Court: Why not put that statement with this check, and then the jury will understand that Mr. Carr is claiming only out of the check the $80.96, which should be a charge against Mr. Gothberg.

Mr. Bell: Yes, your Honor, and we ask that that be marked as one exhibit.

Court: Over the objection of the plaintiff, it may be admitted—one check and two bills.

Mr. Bell: Yes, two bills.

Court: They may be read.

Clerk: Defendant's Exhibit R.

Court: Is the asbestos on both bills?

Mr. Bell: It is carried forward.

Mr. Bell then read Defendant's Exhibit R to the jury.

Mr. Bell: And we only claim a credit of $80.96 of the check. You make take the witness.

Court: Counsel for plaintiff may examine. [392]

Recross Examination

Q. (By Mr. Arnell): Mr. Carr, how many times were the pump locations moved?

A. The original one, and just one more.

Q. Only one? A. Only one.

Q. Now, on your first exhibit, which was introduced this afternoon, that was to the City Electric Company, was it not?

A. I don't remember offhand—it was one of the electric companies.

Q. And you testified that the work represented by that statement, which you paid, was a duplica-

(Testimony of Burton E. Carr.)

tion, did you not, of some work Mr. Gothberg charged you for?

A. Well, you see, on one of his statements it says relocating pumps—on one of his statements there.

Q. Well, do you know whether that was for plumbing or electrical work?

A. No, he was supposed to install the pumps.

Q. Just answer my question.

Mr. Bell: Let him answer it.

A. I imagine it would be Anchorage Installation. I would like to see the bill—then I could tell more about it.

Mr. Bell: He's referring to another bill than this one.

Mr. Carr: City Electric would be electrical work then.

Q. There wouldn't be any plumbing work included in that, [393] though, would there?

A. No, City Electric is all electrical work.

Q. Did the relocation of the pump island require plumbing work, also, as extra work?

A. Yes, we moved them about six feet, approximately—it could be more or less.

Q. It would require, not only the plumbers' time, but additional pipe?

A. Extra pipe—but this one pipe they put in first—we couldn't get that one pump to work very well, and when they took it apart, the coupling was broken on one of the pumps.

Q. Do you contend that that charge for electrical

(Testimony of Burton E. Carr.)

work is a duplication of something somebody else did as plumbing?

A. It says relocation of pumps, which could mean quite a bit, but if you read that bill——

Q. I show you Plaintiff's Exhibit 10, which reflects an extra of $80.02. Would you examine that statement, Mr. Carr, please? Would you examine the statement attached from the Anchorage Installation Company? Do you find any extra electrical work on that statement?

A. I can't see on here where it says Anchorage Installation.

Q. Do those statements represent plumbing work though, Mr. Carr?

A. I forgot my glasses—I can't make that out. Well, yes, it [394] is plumbing fixtures. I can't hardly make it out, but I can see some marks that could be plumbing, but that electrical part—Mr. Gothberg was supposed to replace the pump, but I don't see where he's got any charge in here. We paid for all the electrical wires all the way through the building, because there's 140 feet there, and they wouldn't use that twice—they wouldn't tear out wires which they didn't—they used some wires and we got charged for it.

Q. Do you find any charge for electrical work?

A. They haven't got their name on the sheet here.

Q. Do you find any writing on that statement before you, which reflects that it was electrical work?

(Testimony of Burton E. Carr.)

A. No, I don't see any electrical work.

Q. Likewise, on your own exhibits, you don't find any statement reflecting plumbing work, do you?

A. On the one I have, no plumbing work, no—but what I was trying to get—and they had me charged with electrical wire—100 and some odd feet. Well, Mr. Gothberg should have paid for that wire.

Q. Where are the holes outside the building, Mr. Carr?

A. All along the side of the building, and going out the front door, there.

Q. How many yards of gravel did you buy to refill them?

A. The only thing I could get available was regular concrete— [395] gravel and sand, and that's what I bought, to fill all along the side of the building, because there were holes there and people could break their leg—and he was supposed to fill that up. He was supposed to buy all the backfilling.

Q. How many yards did you say you put in there?

A. What was on that statement—I think a yard and a half of each, I believe. I believe a yard and a half of sand and a yard and a half of gravel—but they had to mix it because they couldn't get the regular pit run gravel, because it was frozen.

Q. But a yard and a half was all you put in, is that right?

A. I believe so.

(Testimony of Burton E. Carr.)

Q. Now, Mr. Carr, how big were the holes that you filled with the yard and a half of gravel?

A. All along the side. According to the contract, he should have backfilled that. I told him I wanted it backfilled because with frost and heat there is great big holes all along the side of the building—to fill up all those holes.

Q. Do you mean, Mr. Carr, that those holes were six-inch or a foot wide, and the full length of the building, or wider?

A. It don't take much of a hole to make up even a square foot of gravel, but some of them was a foot and a half deep, and two feet deep in places—but where they backfilled, [396] the frost come in there, where the lumber and stuff was laying, and we had to clean that up—but there were holes all through that side, and it was dangerous for anybody to walk.

Q. How far did they extend from the outside of the building? A. Five feet.

Q. For the entire length of the building?

A. Different places all along there.

Q. You filled all those places with a yard and a half of dirt, is that correct?

A. Quite a bit more, because quite a bit we hauled in ourselves in the spring of the year—ourself — and the City come in in the spring and graded it.

Q. The City required you to lower the grade?

A. No, I just knew the man that was driving the city grader, and I asked him if he would mind

(Testimony of Burton E. Carr.)

grading it. We put in about three yards of gravel, but we hauled it from another place. We aren't charging him for that.

Q. Mr. Carr, did you use any of this gravel in the front of the building?

A. We used it along the side of the building where the customers had walked, from one door to the other—it was about five feet along there that we distributed that,—even if it's two inches thick from one door to the other, all along that side, it would take quite a bit of yardage. [397]

Q. Is it your testimony, then, that you didn't use any of this in the front of the building?

A. We used it along the side, from the door on.

Q. I still don't understand your answer. Do you mean that you used it along the side of the diagonal portion of the building?

A. There's one place where you come out the door—right in front of the door—that was about a two-feet dropoff right in there.

Q. Mr. Carr, I call your attention to the specifications. Is it not a fact that the contract and the specifications reflected that the backfill was all down around that portion of the building, around the low portion?

A. No, he was supposed to take care of all the backfilling on the building.

Q. That is your testimony, is that correct?

A. Yes, that's right.

Q. Well, Mr. Carr, did you do this before or

(Testimony of Burton E. Carr.)

after you sold the building—the so-called backfilling?

A. Before I did it.

Q. Now, you have testified regarding the use of some fire board. Did the plans and specifications, as such, call for a fire wall?

A. Yes, there was supposed to be a fire wall out of block.

Q. Was the purpose of it to act as a fire stop, or was that [398] merely the type of construction?

A. It was supposed to have been blocks—block fire wall.

Q. Well, did you change your mind about type of construction that was to be put into the partition?

A. Mr. Gothberg changed my mind. He wondered what kind I wanted in there, and he said it didn't go with it—but I told him that it did, and he said no, it didn't include that, and he went and checked it over, and found out it did, after we went ahead and built it out of wood.

Q. When did you agree to this change?

A. When we were building the building—before we got into the building—moved into the building.

Q. Well, Mr. Carr, do you have with you the agreements whereby you agreed to certain work for the purchasers of that building?

A. Oh, yes, I have those.

Q. Does your counsel have them here?

A. Yes, he does.

Q. Would you point out to us, in those agree-

(Testimony of Burton E. Carr.)
ments, the specific provisions which required you to do certain work?

A. It don't say any specific thing. Mr. Akers—there is a lot of stuff that is not completed, and so I said we are going to build it up to his specifications. We are going to do what Mr. Gothberg didn't do.

Mr. Arnell: Mr. Bell, do you have those agreements? [399]

Mr. Bell: Sure, I have them, but they have nothing to do with this lawsuit. He asked me to bring them here, and I did, but they have nothing whatsoever to do with this. This is the contract of sale of his business later.

Mr. Arnell: He testified he agreed to do certain work.

Mr. Bell: Well, you brought it out on cross examination. I never asked him about it.

Mr. Arnell: We can't control the scope of his testimony, your Honor. I think the Court and jury are entitled to know precisely what Mr. Carr agreed to do, and for that purpose I ask that the document be produced.

Mr. Bell: Object.

Court: How is it relative, Counselor?

Mr. Arnell: Apparently Mr. Carr relies upon this agreement to show that he has to do certain work, which, as he said a few minutes ago, is work that Mr. Gothberg should have done, and by the terms of the contract, he is going to do it. I would like to see the contract which obligates Mr. Carr

(Testimony of Burton E. Carr.)

to perform any of this work, if the jury feels it was not performed.

Court: How was this testimony brought out—on direct examination or cross examination?

Mr. Bell: All on cross examination.

Mr. Arnell: It still came out, your Honor, and I asked the other day if this agreement was in writing, and he said yes. [400]

Court: How did the testimony come in in the first place?

Mr. Arnell: As I remember, your Honor, on direct examination, he said he would have to perform certain work to bring the building up to what he represented it to these people.

Court: That is my recollection of it. He may have volunteered it, and as I recall, he said it on direct examination. Therefore, counsel has a right to inquire into it on cross examination, and the document will be produced.

Mr. Bell: Your Honor, I would like to know what contract he wants. Have him ask for a particular contract. I've got all the contracts the man has. Now, I'll present any one that your Honor orders me to.

Mr. Arnell: Your Honor, we don't know which one Mr. Carr has referred to.

Court: Maybe Mr. Carr can select it. You may step down, Mr. Carr, and select the contract which you think bears on the matter that has been discussed here.

Mr. Bell: Your Honor, while he is checking

(Testimony of Burton E. Carr.)

here, I would like to renew my objection to this for the reason that the defendant, by cross examining the witness on the matter, can make other documents go in evidence because they have been explained by Mr. Carr to him on cross examination only.

Court: I think this matter was mentioned first by Mr. Carr on direct examination, Counselor. He may have volunteered the testimony, but nevertheless he said, as I recall, on direct [401] examination, he had made certain agreements to have this building in the shape it would have been if Mr. Gothberg had complied with the contract, and I assume he conceived it bore upon the question of damages and the right to recover. While the papers are being examined, we may as well take our hourly recess, and the jury will remember the admonitions of the Court as to duty. The court will stand in recess for 10 minutes.

Whereupon, the court at 3:53 o'clock, p.m., recessed until 4:03 o'clock, p.m., at which time the following proceedings were had:

Mr. Bell: Your Honor, at this time we have furnished counsel for the plaintiff with the contract he wanted. Pargraph 13 covers exactly the question he has asked about, and we have no objection to permitting him to read it to the jury if he cares to.

Court: Very well. The record will show all members of the jury present.

Mr. Arnell: Ladies and gentlemen of the jury, I will read you Paragraph 13 of this contract: "It

(Testimony of Burton E. Carr.)

is agreed by the parties hereto (which include Mr. Carr) that certain work is to be done to finish the building, which is located on the real property above-described, and the Sellers agree to do such finishing at their own cost and expense and without liability to the Buyers therefor."

Q. Now, Mr. Carr, will you specify what work, under this [402] clause, you have agreed to do?

Mr. Bell: Object to it. It is incompetent, irrelevant and immaterial. The instrument speaks for itself, and if he tried to figure out in minute detail what he should have to do to comply with this, it is just burdening the jury with the unnecessary. It is a matter not to be passed upon in the case and is incompetent, irrelevant and immaterial.

Court: Overruled. You may answer.

A. We pointed out a number of things all over the building, Mr. Arnell, and they know just exactly what's wrong with them—the building, I agreed to put it up in shape. They only paid a small down payment on the building. They are not doing as big a business as we did, and we are liable to have to take it back, and when I take it back, I want it in great shape—I don't want it the way it is.

Q. Did you sell the building, Mr. Carr, for more than it cost you?

Mr. Bell: Object to that as incompetent, irrelevant and immaterial, your Honor.

Court: The objection is sustained.

Q. Mr. Carr, are you able to specify each item that would be included within this clause?

A. Well, that's pretty hard to say on each item,

(Testimony of Burton E. Carr.)

because we went through all those items there. There's so many of them there, I have a list of all the items that has to be [403] done. I can give you the list if you would like.

Mr. Arnell: That is all.

Mr. Bell: That is all, Mr. Carr.

Court: That is all, Mr. Carr.

Mr. Bell: We would like to call Mr. Wyke.

Whereupon, Mr. Carr was excused as a witness and

CHARLES E. WYKE

was called as a witness on behalf of the defendant, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bell): Will you state your name, please? A. Charles E. Wyke.

Q. Mr. Wyke, where do you live?

A. Grandview Gardens, Anchorage.

Q. How long have you lived in Alaska?

A. Approximately seven years, counting military service.

Q. And what is your business, or trade?

A. Right now I am in charge of the carpenter shop at Post Ordnance, Fort Richardson.

Q. And have you had experience in building?

A. Yes.

Q. Have you been a superintendent on building?

A. Yes.

Q. How many years of experience have you had in that line? [404]

(Testimony of Charles E. Wyke.)

A. Approximately four years for myself and one year for Johnson Construction Company as supervisor, and about six months as foreman for Archie Cupples.

Q. Did you work for Mr. Gothberg on this job for Burton E. Carr?

A. I did.

Q. How long did you work there?

A. Approximately three months, I believe.

Q. During the time you were working there, what was the condition of the weather?

A. When I first got on the job, it was just starting to get cold, and when I left it was too cold to work at all.

Q. And can you give us approximately the date that you left there?

A. About the 13th of December, I believe, 1951.

Q. Had the cement blocks been laid up to that time, or cinder blocks, or whatever they are?

A. I believe they were all done but for that one partition that was supposed to go in between the show room and the garage.

Q. Was there supposed to be a partition of blocks between the show room and the shop?

A. I understood there was.

Court: When did you say you left?

Mr. Wyke: Approximately the 16th of December. [405]

Court: You had been there about three months?

Mr. Wyke: Approximately.

Q. Was that partition in when you left there?

(Testimony of Charles E. Wyke.)

A. No, it wasn't. The floor hadn't been poured yet.

Q. Did you, at my request, go there and examine this building recently? A. Yes, I did.

Q. Is that concrete wall, or block wall, or fire wall, or whatever you call it—has that ever been built?

A. There is a wooden partition there at the time now.

Q. And is the concrete, or cinder block, partition in? A. No, it isn't.

Q. Has it ever been, or can you tell whether it's ever been there?

A. That's hard to say, but it doesn't seem they would build a partition and tear it out and put a wooden one in.

Q. There is just a wooden one there now?

A. Right.

Q. Were you there when they were pouring some concrete around the front part of the building, and Mr. Gothberg was there?

A. Yes, I was there.

Q. Do you remember an incident of a piece of lumber, or wood, being left sticking down in the concrete when they quit?

A. Yes, I remember it. [406]

Q. Just tell the jury what took place at that time?

A. Well, generally, when you pour concrete down a wall, you generally ram it down with a stick, to make it go all the way to the bottom, to make it

(Testimony of Charles E. Wyke.)

go in around the steel. And at the time we were pouring—I believe there were three of us on the job—and Mr. Gothberg came with the concrete, and I was up on top with two other fellows, pouring the concrete—and I had a stick, and I believe the other two fellows had sticks, and we were pushing the concrete to the back of the form about 12 feet down inside—and Mr. Gothberg came up at the time and took the stick from me, and told me to smooth off the tops with a trowel, which I did. And when the pour was done, I believe I was on the south wall when we finished pouring the lintels, and it was quitting time and I went home. And the next morning I went to work and went up to inspect the forms on top to see if this concrete had frozen pretty cold—and Mr. Gothberg came about that time, and he was on top, and he saw the stick in the wall, still sitting there in the corner, and right away he accused me of leaving the stick there, which I know I didn't, because I have never done anything like that. I would make sure it was clear before I left it. The concrete had set up hard enough so you couldn't pull the stick out—and the bottom of the form had come apart and snapped under the weight [407] and the concrete had poured out between the block wall and the form. It made a very messy job—that whole thing.

Q. Did you later look to see what the result was in the finish concrete, with relation to that stick, or piece of timber, having been left there?

(Testimony of Charles E. Wyke.)

A. Well, it will absorb moisture and swell, and automatically crack the wall.

Q. Did this one crack the wall?

A. I looked last spring, and the wall had cracked at that time.

Q. Now, did he do anything about repairing this concrete wall at the bottom, where the ties had broken loose and it had spread and, you stated, had become a rather messy job, I believe?

A. Well, it appears to have been chiseled off and ground in with powdered concrete to smooth the wall down. It looks a lot better now than it did when I first went back to check on it.

Q. What kind of weather were the blocks laid in?

A. Anything but mild weather. It was very cold.

Q. Can you remember approximately the temperatures along about that time?

A. I think it must——

Mr. Arnell: Your Honor, I think the temperatures would be best proved by the Weather Bureau records. [408]

Court: That is true. If the witness can name a special date, or dates, we can get the weather records, I suppose, or the records of the Weather Office. If he is unable to name any particular date, the best he can do is to say what he recalled as to the temperature when he was doing certain work. Counsel may proceed.

Q. Can you remember any particular date that

(Testimony of Charles E. Wyke.)

the blocks were being laid? Any date of the month or calendar date?

A. Well, it would have to be in November, and it was below zero—that is all I would be able to say. I know it was very cold. I remember at that time the wind blew pretty hard where we were building the marquee, and we could hardly stand to work on the door of the building at all more than 20 minutes at a time.

Q. Was there any canvas put over those blocks, or this wall where the men were laying them? Was there any canvas put there or heat applied?

A. I didn't see any canvas on any of the block work. I know there was no heat.

Q. Is there a regular approved method of applying heat for concrete block wall in the winter time?

A. Well, there isn't any I would recommend right off, because, as the block wall goes up, you can't keep it covered up. The block just shouldn't be laid in freezing weather in my estimation. [409]

Q. Is there a method whereby contractors do sometimes go ahead with laying up the concrete block wall?

A. Yes, they can put this sodium chloride in the mortar mix, which will raise the freezing point in the mortar mix, but after you put so much of the stuff in there, it tends to weaken the mortar.

Q. Is there a method whereby the wall is covered with canvas or a tent, or whatever you would

(Testimony of Charles E. Wyke.)

call it, and heat blown in there with a regular heating system?

A. If you have a roof on and four walls up, you can drape canvas over your openings, and put in a heater—you can use that to pour a floor and it will keep the floor from freezing.

Q. Do you know whether or not the weather was such that the mortar did freeze in the blocks that were laid down there?

A. Well, I worked alongside of the men who were laying them, and I know several times the men walked off the job in disgust because they didn't want to do a bad job. Sometimes they would not show up for two or three days because they refused to lay blocks when it was that cold.

Q. Did you observe the mortar that was being used by those men at that time to see whether or not it did freeze on the mortar boards?

A. Yes, they hauled the mortar up to the walls in a box, and they had other boxes that were empty, that they kept fire [410] in. They tried to keep the mortar board sitting on top of the fire to keep it from freezing, but as soon as they touched their trowel to it, and touched it to the block, as a general rule, the mortar froze immediately.

Q. From your experience, in building, is a wall very safe that is laid up that way until it's torn down and relaid?

A. Well, I am not an engineer, but for my own money I wouldn't buy a wall like that.

Q. Do you know whether or not the specifica-

(Testimony of Charles E. Wyke.)

tions—and did you see the specifications there on the ground—that provided that any cement work should be done when the temperature was below 32 degrees?

A. No, I didn't see any specifications like that. I was a workman on this job. I don't believe I ever saw specifications on the job, except perhaps for the hardware that you were referring to.

Q. Would you consider it good workmanship to lay concrete blocks, or cinder blocks, with mortar when the temperature was colder than 32 degrees?

Mr. Arnell: If your Honor please, we wish to interpose an objection. Mr. Wyke testified he is not an engineer and, in response to Mr. Bell's other questions, at least *intimidated* he wasn't qualified to answer. I think it calls for conclusions from a man who isn't an expert.

Mr. Bell: He is an expert in the line of building. He was [411] supervisor.

Mr. Arnell: We are dealing with bricks and mortar here, your Honor, not carpenter work.

Court: Are you a carpenter, principally, or do you know lots about concrete and mortar?

Mr. Wyke: Basically, I am a carpenter, but I have had experience with mortar and laying up block buildings.

Court: How much experience?

Mr. Wyke: I contracted for two years in Kirkland, Washington. I built four houses there with concrete block. Last year we put up 22 block furnace rooms on the Post.

(Testimony of Charles E. Wyke.)

Court: Did you participate in that yourself, either by working or by supervising?

Mr. Wyke: By supervising.

Court: I think he has had enough experience to answer and the jury, as with all witnesses who testify as experts, will take into consideration the experience and the qualifications. If a man has vast experience, his testimony ought to be accorded greater weight than that of a man with little or no experience. The Reporter may read the question and the witness can answr.

Reporter: "Would you consider it good workmanship to lay concrete blocks, or cinder blocks, with mortar when the temperature was colder than 32 degrees?"

A. I understand there's ways of doing it, but I don't believe [412] that the ordinary mix they use should be used that cold, no.

Q. Now, what is the general opinion, or general opinion based upon experience of concrete or concrete mortar, when the same becomes frozen. Does it or does it not disintegrate?

A. Oh, I would say four out of five times it will, yes. It turns to powder—gets powdery—the blocks can be readily jarred loose.

Q. Did you ever notice the chimney that was built in that building there, under Mr. Gothberg's construction?

A. Yes, I saw this chimney at the time it was being put up.

(Testimony of Charles E. Wyke.)

Q. Was it bad weather when that was put up, too? A. Yes, I believe it was.

Q. Did you see that chimney afterwards?

A. Yes.

Q. Before it was torn down, you saw it?

A. Yes.

Q. Just tell the jury what the condition of the mortar was between the blocks in that chimney?

A. Well, that was a classic example of mortar turning to powder. As I remember, you can take a nail head and pull it right out from between the blocks.

Q. Did you observe the front windows in this building? A. Yes. [413]

Q. Would you please tell the jury what condition they are in and what condition they have been in all along, since they were set?

A. Well, at the time I notice there was about a quarter of an inch crack along one side of the window in front there. Apparently the glass doesn't fit.

Q. Do you know whether or not there has been any sagging, or settling, of that front wall that causes that glass not to fit the opening?

A. I think it would take an instrument to determine that definitely.

Q. Well, do the glass fit the opening?

A. No, they don't.

Q. And are they such that they shut the air out completely, even patched up?

A. This one I saw is not patched at all.

Q. It had an opening? A. Right.

(Testimony of Charles E. Wyke.)

Q. How wide an opening?

A. About a quarter of an inch, running to the top of the window.

Q. Did you, at my request, inspect the bolts or rivets in the joints where the steel was put together, to see whether or not they were painted?

A. Yes. [414]

Q. Would you just tell the jury, from your examination, what you found to be true?

A. I used a pocket knife and scraped away the aluminum paint very carefully, and I couldn't detect anything except the aluminum paint on the bolts or the rivets.

Q. The heads of the rivets were red or black?

A. They were black.

Q. And had no red lead on them?

A. Not that I could see.

Q. Now, did you scrape some portions of the steel beams, themselves, to find whether they had one or two coats of paint on them?

A. Yes, I did.

Q. How many coats of paint did they have?

A. It was pretty hard to tell. There's one or two coats on them.

Q. Could you tell whether there was any rough places—could you tell there, whether or not there was one or two coats?

A. No, because apparently these aluminum coatings are put on very close together before the first one has set up. It's just like painting with new

(Testimony of Charles E. Wyke.)

paint on something that's not dry, but it did blister. There was one or two blisters on the beam.

Q. Did you satisfy yourself that there was two coats of aluminum anywhere? [415]

A. No, it's too hard to determine—with two coats over one, that one could look like two coats.

Q. I see. Approximately how many places did you check to see if red lead had been applied on the beams?

A. How many places?

Q. Yes. Well, on the joints, we will say?

A. I checked four or five different bolt heads.

Q. And did any of those have any red lead on them? A. No, these didn't.

Q. Now, construction steel, that is manufactured or fabricated at a mill and shipped in, always has a prime coat on it, does it not, or generally?

A. Generally, yes.

Q. Is that prime coat red, or what is it, generally? A. Generally red.

Q. Did you find any red lead anywhere on any of this work, other than that prime coat that was on the steel when it was fabricated at the factory?

A. No, I didn't.

Q. Did you observe the condition of the concrete blocks over the windows, and in the back part of the building—I believe that would be referred to as the south wall. Did you look those over?

A. Yes, I saw those.

Q. What condition are they in? [416]

A. There's fine, hard line cracks on some of

(Testimony of Charles E. Wyke.)

them, and otherwise the spread is as much as 1/16 of an inch.

Q. What is the condition of the mortar between those blocks, up around the windows and over the windows? A. It looks like it had frozen.

Q. Did you observe the concrete floor in the building?

A. Yes.

Q. What condition is it in?

A. Well, the concrete itself appears to be in fairly good shape now, except around the front there where it had cracked. It is flaking off and peeling there.

Q. You mean the hardness of the concrete—or is it level and smooth? Does it properly drain?

A. An instrument is the only way. I wouldn't want to check that for level.

Q. I see. You weren't in there when there was snow melting on the floor, or anything like that?

A. The floor had not been poured when I left the job.

Q. Did you, at my request, and at the request of Mr. Carr, figure the cost of all the work that Mr. Gothberg did, by way of extra, on the concrete walls—on the show room and the office, and whatever was done there—including the partition. Did you make an estimate of that?

A. Yes, I did.

Q. And did that estimate include the balcony up above? [417] A. Yes.

Q. What estimate did you arrive at that would

(Testimony of Charles E. Wyke.)

be approximately the cost of furnishing the material and the labor to do that?

A. I believe my figures were around $2,750.00.

Q. And were you skimping on that, or did you allow additional for it?

A. I gave Mr. Gothberg the benefit of the doubt, I think.

Q. To about what extent?

A. Around $250.00 or $300.00.

Q. Did you do any of that work yourself there?

A. No, I didn't work on that particular part of the work at all.

Mr. Bell: I think you may take the witness.

Court: Counsel for plaintiff may examine.

Cross Examination

Q. (By Mr. Arnell): Mr. Wyke, you said that you were not an engineer. Did you mean you had had no engineering education? A. Right.

Q. None whatsoever?

A. No, I have had no formal engineering education, no.

Q. What engineering knowledge you have acquired then, has been attained through experience and working on jobs, is that correct? [418]

A. Right.

Q. In what capacity were you employed on this job? A. As a carpenter.

Q. Were you employed there during the entire time that that block work was being done?

A. No, the block work had already been started,

(Testimony of Charles E. Wyke.)

and it was up to the bottom of the windows, I believe, when I came on the job.

Q. That was about the middle of October, was it not? A. Right.

Q. Do you know whether Mr. Cupples had any block work going on at the same time elsewhere in town?

A. I believe he had one house in Rogers Park that he was finishing, but the block work had already been finished. He was finishing the inside, with carpenters.

Q. At the time this work was going on?

A. I believe so, yes.

Q. Were you acquainted with all the bricklayers that worked on this job?

A. Yes, I was.

Q. Do you know that some of them were taken off the job to finish block work on another job here in town, or did you ever have occasion to discuss that, or acquire the knowledge?

A. I don't know of any other job he had running at that time [419] that he could take them off and put them on.

Q. You testified, on direct examination, that you built the forms for the lintels?

A. I believe there was four of us there at the time, who were building those.

Q. You made some reference to the forms sagging or splitting at the bottom, or something. Did that occur on all of them, or just one?

A. I don't believe it happened on any of the

(Testimony of Charles E. Wyke.)

lintels. It happened on the beam in front of the building, where the cement wall joins the block wall on the northeast corner of the building.

Q. Is an incident like that the result of improper forming, in most cases?

A. That's right.

Q. Now, who did the forming on that particular work?

A. I believe there was I, and a man that was supposed to be a foreman on the job at the time.

Q. Did the form twist out of shape, or merely spread enough so the concrete slid out past the block?

A. If I remember right, we were not allowed time enough on the forms—before Mr. Gothberg had ordered the concrete—to tighten this back form —and we warned him about it before we poured the concrete.

Q. I didn't ask you how much time you had, Mr. Wyke. What [420] happened?

A. The concrete broke the bottom form and spread.

Q. Is that on the floor?

A. At ground level. I believe the form has been taken out.

Q. Has that portion been covered up, or chiseled off?

A. It has been patched and repaired since then.

Q. Is there any structural defect as a result of that—of the spread of the form, and the pouring of the concrete out through the crack?

(Testimony of Charles E. Wyke.)

A. You mean, is there a structural weakness there?

Q. Yes, as a result of that?

A. No, it just makes a messy job.

Q. Now, where was this wood stick that you referred to in your direct testimony?

A. I believe about within 12 inches of the end of this pour.

Q. Well, was it in the lintel or post?

A. It was in the pour next to the cement block wall.

Q. In the top or bottom, or where?

A. From the top to the bottom.

Q. All the way down?

A. It might have been six inches off the bottom —maybe more.

Q. How much of the concrete had been poured that night?

A. It was poured right to the top of the building.

Q. How long was the stick that was in that concrete? A. Very long. [421]

Q. How long was the stick?

A. Probably 14 feet long.

Q. Was it a two-by-four?

A. No, it was a piece of one-by—stuff that had been ripped down to about three inches wide.

Court: About 14 feet long?

Mr. Wyke: That's right.

Q. What had you been using it for?

A. To get the concrete to the bottom of the pour.

(Testimony of Charles E. Wyke.)

Q. You say the concrete was poured all the way up past this, and on up to the top, is that right?

A. I don't know how the stick was laying in the bottom at all, because I didn't have hold of it when the pour was finished.

Q. Wouldn't it be pretty difficult, Mr. Wyke, to leave a 14-foot stick in when somebody was handling it?

A. No, this wouldn't be the first job it's ever happened on. A man can be pretty busy during pouring of concrete—especially Vic was trying to be all over the place at one time to see the pouring, and it would be very easy to leave a stick sitting in there.

Q. Was the stick left in the center of the concrete, or the edge?

A. I believe the bottom came to the edge when we took the form up, but the top of it, I believe, was in the center [422] of the pour.

Q. And there was 14 feet of wood, then, in the center of this post, is that correct?

A. Approximately. I think it was 14 feet long.

Court: I think we shall have to suspend now. You may step down, Mr. Wyke. The trial of the case will be continued until 2 o'clock tomorrow afternoon. Another hearing comes up tomorrow morning at 10:00 o'clock. So please return tomorrow afternoon at 2:00 o'clock, ladies and gentlemen of the jury, and in the meantime, remember the admonitions of the Court as to your duty. You

(Testimony of Charles E. Wyke.)

may now retire and the court may remain in session.

Whereupon at 4:45 o'clock, p.m., September 29, 1952, the trial of the above entitled cause was continued until 2:05 o'clock, p.m., September 30, 1952.

Be it Further Remembered, That at 2:05 o'clock, p.m., September 30, 1952, the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: Another witness may be called on behalf of the plaintiff.

Mr. Bell: There was a witness on the stand. Mr. Arnell [423] was cross examining him.

Court: Mr. Wyke, I believe it was. Mr. Wyke may come forward. Counsel for plaintiff may resume examination.

Q. (By Mr. Arnell): Yesterday, Mr. Wyke, you testified that you quit working on this building about December 13th or 15th, of 1950, did you not?

A. Yes.

Q. At that time was the rough-in-work, including the partition between the rear and the front portion of the garage—was that work completed?

A. No.

Q. When I say completed, I don't mean finished by Husky Furniture, but had the rough-in work

(Testimony of Charles E. Wyke.)

all been done, including the hanging of the double door?

A. No, that wasn't put up until after the floor was poured, I don't believe. I wasn't there when the floor was poured or when the partition was put in.

Q. None, then, of the rough-in work was done at the time you finished, is that right?

A. On that partition.

Q. Well, how about the rough-in work on the inside of the show room?

A. I believe the doors were in, and I believe that was all. The two front doors were on. [424]

Q. Had the windows been installed at that time?

A. No, they hadn't.

Q. How were they covered? Were they covered with plywood sheets?

A. I believe we had plywood sheets up there for awhile, and he had to take them down to use them for something else.

Q. Now, yesterday, Mr. Wyke, you gave Mr. Bell a figure of $2,750.00 as your estimate of certain work. Do you have that broken down with you here today? A. No, I don't.

Q. Did you ever make any memorandum of it?

A. I could tell you what I figured, yes.

Q. Now, first tell me what type of work that figure included?

A. Rough carpenter work that went into the partitions, the material, the sheathing that went on, and the forming strips for around the front there,

(Testimony of Charles E. Wyke.)

that Husky Furniture later put the plywood on.

Q. How many feet of lumber did you figure it would take to rough-in the ceiling and all of the inside walls, included in this figure you gave Mr. Bell?

A. I haven't got the paper with me. I had Columbia Lumber figure this lumber for me so I wouldn't make any mistakes.

Q. How many feet of each type of lumber would be required?

A. I would have to have my notes to refresh my memory.

Q. How many man hours of carpenters would be required? [425]

A. I believe I figured two men for 10 days.

Q. How many hours per shift?

A. Nine hours.

Q. That would be 180 hours, is that correct?

A. 180 for two men? It would come to more than that, wouldn't it?

Q. Nine hours per day per man for 10 days?

A. Nine hours a day for two men for 10 days.

Q. In other words, 18 hours a day?

A. Right.

Q. And 10 days would be 180 hours?

A. You have overtime in that, too.

Q. Upon what basis, Mr. Wyke, did you arrive at this figure of 180 hours? A. Estimation.

Q. What did you take into account when you estimated 180 hours?

A. The work I outlined just now.

(Testimony of Charles E. Wyke.)

Q. With two men, and only two men?

A. Two men could do that rough work very easy.

Q. Within a period of 10 days?

A. Yes.

Q. Would that include the framing in of the windows—installation of the windows?

A. That is not what I was asked to estimate.

Q. What did Mr. Bell ask you to estimate?

A. The framing of that partition, the balcony, the sheathing, the asbestos that went on that partition, and the forming strips that were used on the walls around the front of the show room there.

Q. You had forming strips all the way around, did you not, except in the partition across the building? A. Right.

Q. Did you figure those in, too—the ones on the side walls?

A. Yes, around the show room there.

Q. Did your figure include finishing the ceiling with the material Mr. Carr bought?

A. No, I didn't figure any finishing work at all.

Q. You didn't figure any finishing work?

A. Right.

Q. Can you give any estimate at this time as to what the finishing work would be?

A. No, I think I took a day and a half to figure out what I did to be sure I was right. I wouldn't attempt to give an estimate now on what that costs.

Mr. Bell: Object to that, anyway, because all the evidence shows Husky Construction Company

(Testimony of Charles E. Wyke.)

did the finishing work. Therefore, it wouldn't make any difference.

Court: Overruled.

Q. Do you know how much work Husky Furniture did, Mr. Wyke? [427]

A. I wasn't there.

Court: Answer the question.

A. I have no idea how much they did, no.

Q. If Mr. Gothberg did the finishing around the doors, and all of the other finishing except what has been testified to as having been done by Husky Furniture, would there be additional charges, over and above this figure that you have given us?

A. If Mr. Gothberg had done the finishing work?

Q. Yes.

Mr. Bell: Object to the question for the reason that Mr. Gothberg testified what he did, and it did not include that.

Mr. Arnell: It included, your Honor, certain finish work around the windows and door frames.

Court: Overruled. This is an expert witness. He may answer.

A. No, I have given him the benefit of the doubt by raising this estimation over and above what my actual figures were.

Q. Will you answer my question, Mr. Wyke, please?

A. You are asking if he would have charged anything extra, above the cost of material and labor, is that right?

Mr. Arnell: Would you read the question, please?

(Testimony of Charles E. Wyke.)

Reporter: "If Mr. Gothberg did the finishing around the doors, and all of the other finishing except what has been testified to as having been done by Husky Furniture, would [428] there be additional charges, over and above this figure that you have given us?"

A. I don't think it would have anything to do with what I figured, because it wasn't in the figure.

Q. Just answer the question.

A. I am not evading. I don't know what you are trying to get at.

Q. Did your estimate include hanging of any doors? A. No.

Q. Framing of the doors? A. No.

Q. Framing or installation of the windows?

A. The windows never entered into it.

Q. You mean you didn't figure framing of windows? A. Right.

Q. You figured only the material and time it would take to rough-in the interior portion of the building, is that correct? A. Right.

Q. And you left on December 15th, so you do not know how much work was done by Mr. Gothberg on these other extras after you left, do you, Mr. Wyke?

Mr. Bell: Your Honor, object to the form of the question because the windows, and the doors, and the glass, and all of that is in the contract. [429]

Court: Overruled. You may answer, if you know.

Mr. Bell: Exception.

(Testimony of Charles E. Wyke.)

A. I don't think there was much extras on those windows.

Court: The question is, do you know what was done after you left?

Mr. Wyke: I have no idea.

Court: That is what counsel is asking for.

Q. Mr. Wyke, is it also not a fact that the windows were installed in and around the office?

A. There are windows there, yes.

Q. Do you know who installed those?

A. I have no idea.

Q. If those were installed by Mr. Gothberg, would the cost and charges of this be added to the figure that you have given of $2,750.00?

A. Yes, that would be outside of what I figured, yes.

Q. Now, yesterday, Mr. Wyke, you testified that the mortar froze immediately, was that correct?

A. Absolutely.

Q. You mean that, before they could get it off the trowel, it froze?

A. No, as soon as it got on the block. They did get it on the block, but it was in a semi-state of being froze before the block was laid.

Q. Was it frozen to the point where the blocks could not be [430] laid in place?

A. No, but it was frozen enough so it wouldn't bind to the blocks.

Q. All right. Mr. Wyke, how much experience have you had in block laying?

A. Of my own work, or supervision?

(Testimony of Charles E. Wyke.)

Q. Your own work, first.

A. I have laid about four separate duplex block buildings down in the States, and I have done some up here on my own.

Q. On those that you have done up here on your own, did you do those after this particular job, or before?

A. I have done them since and before.

Q. Under similar conditions?

A. No, I have never attempted to lay blocks in freezing weather.

Q. Did you attempt to—in the State of Washington?

A. It never gets that cold down there.

Q. Had you ever had any experience, Mr. Wyke, in laying blocks in weather of this kind?

A. No, I haven't, no.

Q. Do you know what the effect would be of laying blocks in weather of this kind?

A. It was very plain—the way they were laying them—that they were not sticking, and the men were taking them back out.

Q. Were you there when the west wall went up?

A. Yes.

Q. Were you there when the east wall went up?

A. Partially, yes.

Q. Weren't the conditions you have described in existence at the time those walls were built?

A. The upper parts of these walls—all of them, yes.

Q. Well, yesterday you said that the concrete

(Testimony of Charles E. Wyke.)

would disintegrate if it was frozen, is that correct?

A. I don't belive that is the word I used, is it?

Court: I think it would be better for all of counsel not to say "yesterday you testified so and so." The proper question is, "Did you, yesterday, testify to so and so?"—then if the witness says "yes", proceed.

Q. Did you, yesterday, testify, Mr. Wyke, that if mortar froze that there would be a tendency for it to decompose or weaken?

A. Yes, I did.

Q. Is that a condition that will occur in all mortar?

A. I have never seen all mortar, but on this particular job, yes.

Q. In other words, Mr. Wyke, if mortar freezes, will it likewise soften?

A. No, I don't believe it will.

Q. What do you mean?

A. I have never been on all jobs. I couldn't testify to that. [432]

Q. Well, what kind of an inspection did you make out here on this building the other day, at the request of Mr. Bell?

A. I looked at the walls—the condition of them —and the mortar that was in the walls.

Q. When you say you looked, what did you do —just stand off at a distance and look?

A. I took my knife and flaked it right out of them—just like this powder.

Q. Where did you do that?

(Testimony of Charles E. Wyke.)

A. Over the balcony, over above the marquee in one place, and on the back wall.

Q. Is it not a fact, Mr. Wyke, that the inherent tensile strength of mortar is less than that of cinder block, even though the condition is good?

A. I understand it is.

Q. Do you know what the tensile strength of mortar is?

A. No, but I know that blocks are built under pressure, and mortar isn't laid under pressure.

Q. Do you know what the tensile strength of ordinary average mortar is? A. No.

Q. When you examined these blocks, did you push any of the blocks?

A. I didn't, no.

Q. Do you know whether or not they are loose?

A. I couldn't say now, whether they are or not. I didn't notice any of them were loose.

Q. Mr. Wyke, if the concrete were frozen to the degree you have indicated, would the mortar adhere to any of the blocks?

A. Yes, they do to a certain degree.

Q. When you say to a degree, what do you mean?

A. They didn't bind the block, as if they were laid in good weather, or under ideal conditions.

Q. If the condition of the blocks, now, was firm—that is, the mortar and block were firmly bound together—would that indicate that you are wrong in your conclusion as to the extent of freezing? A. If what you say is true, yes.

(Testimony of Charles E. Wyke.)

Q. Did you observe the condition of the walls out there, Mr. Wyke? A. Yes, I did.

Q. Do you know whether or not those cracks are normal in that type of construction?

A. Any cinder blocks, yes. Cinder blocks have a tendency to crack more than concrete.

Q. Would you describe to the jury how these cracks run?

A. I believe there's only two or three in the whole building that run from the top of the wall all the way to the foundation. Most run from the top half away down, or from the [434] bottom half way up.

Court: May I ask, just as a matter of interest, have you any idea why cinder blocks are more subject to cracking than concrete block—something in the construction of the block?

Mr. Wyke: Cinder block is made of more brittle aggregate than concrete, and it has a tendency to crack.

Court: Counsel may proceed. I was just curious.

Q. Did you observe any of the cracks running directly through the center of the block, Mr. Wyke? A. Yes, I did see a few.

Q. Where the blocked is cracked through the middle, does that indicate that the mortar is adhering properly to the block?

A. The crack couldn't get a start unless the foundation was faulty.

Court: Answer the question.

A. So that this mortar would have to be—

(Testimony of Charles E. Wyke.)

whether it's good or bad, generally, it could crack, yes.

Q. What does the fact that the block is crecked crossways through the heart of the block indicate to you, Mr. Wyke, as an expert?

A. The way those cracks go—is that what you want?

Q. Yes.

A. I would say the foundation is settled—and the poor bind on the mortar—that is, it isn't adhering to the block [435] the way it should.

Q. Where you observed a crack through the center of the block, did you examine the mortar?

A. Two or three places, yes.

Q. Had the mortar adhered properly to the block?

A. In some places it had, and some places it hadn't.

Q. Can you point out where those places are in the building?

A. Generally in the cracks from the foundation up, the mortar is in good condition, but where it is on top of the building down—like over the marquee there—the mortar is powdery, where the building had frozen at that stage of the construction of it.

Q. Now, in regard to mortar that has not been frozen, Mr. Wyke, will it not powder and flake just the same as other mortar?

A. If inexperienced people are mixing the mortar.

(Testimony of Charles E. Wyke.)

Q. Assuming it is properly mixed, can you still scrape it off? A. It shouldn't, no.

Q. Will you answer my question. I don't think that is responsive, your Honor.

Court: It seems to me to be an answer.

Q. Is it your answer—no—that you couldn't scrape it off?

A. That is right—no.

Q. Under any conditions?

A. You are putting conditions in there now. If the mortar is [436] properly set in there, and mixed right, it should be as hard as concrete and just as binding, and you can't chip it, no.

Q. In your inspection, Mr. Wyke, did you look at the walls to determine whether or not they were plumb, and in line, both horizontally and vertically?

A. They appeared to be plumb in all respects, yes.

Q. Did you actually look to make that determination?

A. I believe I looked down the east wall, or the west wall rather, and it appeared to be plumb—that is the largest wall in the building.

Q. At the time those blocks were being laid, were they all placed in proper alignment and distance, with respect to each block?

A. I didn't watch every block being laid, but from what I saw there, it was a very well done job, because the men that were on it were expert block layers.

Q. Was it necessary to go back and chip off any

(Testimony of Charles E. Wyke.)

of the mortar later, on either the outside or inside of the building, with a few exceptions.

A. I didn't notice any of that work being done, no.

Q. In other words, at the time most of the blocks were laid, they appeared to be in good condition, so far as alignment and everything was concerned?

A. What they could lay, yes. [437]

Q. When you examined the paint, Mr. Wyke, did you find on all of the beams a base coat of red lead? A. Shop coat, yes.

Q. That is the coat that is ordinarily applied at the factory, is it not? A. Right.

Q. Did you examine the beams to determine whether there had been any patch work done?

A. You can't see under that aluminum paint whether there was or not.

Q. Then, if abrasions had been painted with red lead as soon as they were painted with aluminum, you couldn't, at that time, say that they had or had not been spot painted?

A. That is right. You couldn't unless you found a spot.

Q. Before you left, Mr. Wyke, did you hang the double doors in the partition between the show room and the mechanics' section? A. No.

Q. Did you hang, or help hang, the 12 by 12 outside door? A. The rolling door?

Q. Yes. A. Yes, I was in on that.

Q. Was that actually and completely installed before you left?

(Testimony of Charles E. Wyke.)

A. Not to my specification, no.

Q. What had to be done to it? [438]

A. We hung the door, but we suggested more bracing up there to hold these tracks in place, so the door wouldn't slide out of the tracks, but we never got any action on it. We left the door sitting in mid-air, practically.

Q. Do you recall an incident when a truck ran into the garage and some portion of the top struck the door?

A. I vaguely remember something about that, yes.

Q. Did that have any effect on the operation of the door?

A. I don't remember whether we had the door up at that time or not.

Q. Did you install the 8 by 8 door in the south wall?

A. Yes, we had the same bracing column on that door.

Q. That was installed before December 15th, then—about that date?

A. Around there, yes.

Mr. Arnell: That is all.

Court: Is there any further direct examination?

Redirect Examination

Q. (By Mr. Bell): Do you remember whether or not the electric part of that big door had been connected and was operating before you left or not?

A. No, it had not been connected.

(Testimony of Charles E. Wyke.)

Q. Do you remember, after they first put the door up, that it fell a time or two? [439]

A. The bottom part of the door had to slide back, and it went off the track, and fell down practically every time we opened the door.

Q. Was that condition still existing there at the time you left? A. Yes, it was.

Q. Now, Mr. Arnell asked you about cinder block. Was there any cinder block used there, as far as you know, or pumice block?

A. I believe he was referring to the cinder at the same time.

Q. Well, pumice block is altogether a different thing?

A. Yes, they are a different block altogether.

Q. There is cinder block, and then there is concrete block, and then there is pumice block, isn't there? A. Right.

Q. I see. Now, weren't you there when they poured the concrete over the front windows?

A. Yes.

Q. Was there anything that came up about the metal rod not tying in at that time?

Mr. Arnell: If your Honor please, I believe that is beyond the scope of direct and cross, both. I hate to object, but I certainly know I didn't bring it out on cross, and I know Mr. Bell didn't on direct.

Court: Overruled. Counsel is probably right. It may be [440] answered to get the whole thing before the jury, and counsel may cross examine later if he desires.

(Testimony of Charles E. Wyke.)

A. The rods that was in the lintels, I believe five or six one-half inch steel rods was supposed to go in there. If I remember right, it was on a Saturday when we put the steel in, and went home, and we came back Monday morning and tied in a couple of places, but it wasn't thoroughly tied, nor ready to pour.

Q. Were they tied, then, and was the rod tying done before the concrete was poured?

A. Not all of it, no.

Q. Do you remember whether or not there was a conversation between some of you, and Mr. Gothberg, about not having those rods tied?

A. Yes, that was on the snap ties on the frames —on the large pour in front there.

Q. What did he say about it?

A. He came one morning, I believe, and said the concrete would be there at 1:00 o'clock. I told him, "You mean tomorrow, don't you?"—and he says, "No, I mean today at 1:00 o'clock," and I said, "We won't be ready because the ties won't be done"—and he insisted we pour at 1:00 o'clock. And he left, and after lunch we went back to tying up this frame, and about 12:30 the concrete came, right after we got back to work, and he insisted on pouring now, and not waiting [441] until we were done.

Q. Did he go ahead, then, and have the concrete poured without the rods being fastened?

A. Yes, we poured the concrete, and in my estimation that is why the bottom of that frame gave out, because it wasn't properly cinched up.

(Testimony of Charles E. Wyke.)

Q. Is the settling of that front wall the cause of the windows not fitting in the front?

A. Yes.

Q. The window frames are not square?

A. No.

Q. Could you tell the jury why they are not square—why the window glass can't fit them?

A. Well, when the frame is poured it should be reinforced, and it never was. It throws the window box out of square and doesn't fit the frame. It will pull the window frame, inside the frame, out of square.

Q. Is that what happened there?

A. Yes.

Q. Now, you were asked about the heat in the place by me yesterday, and I don't believe that I asked you whether or not there was some method used whereby the wall was entirely covered with a frame, or canvas, so that the heat would take care of the laying of the blocks. Now, is there such a method—a recognized method? [442]

A. Yes, there is.

Court: Counsel, this subject was gone into yesterday. I don't know any reason to repeat it unless there is something new that you are trying to bring out. The witness testified at some length about it.

Q. All right. Now, you told, or did you tell Mr. Arnell a few minutes ago, that the cause of the blocks being loose in the wall was the poor bind of the mortar on the blocks?

A. Right.

(Testimony of Charles E. Wyke.)

Q. And did you find that condition in several places that you inspected out there?

A. Yes, I did.

Q. Mr. Arnell asked you about the cracks in the wall. Would you tell the jury about how many large cracks you found in the walls there?

A. Well, they could all be considered large. They separate the wall.

Court: Counselor, you went into this at length yesterday and the witness testified, I think, quite fully, and Mr. Arnell simply made some cross examination upon it. I think the subject is covered.

Mr. Bell: I don't believe I asked how many—that is the only thing.

Court: If anything was overlooked, you may go back and check it over. [443]

Q. All right. Would you tell the jury about how many of those cracks there is that you have discovered in looking at the wall?

A. I believe in the west wall there was nine cracks; in the south wall there was four; in the east wall there was around seven; and the other has two or three large ones in it.

Q. Two or three? A. Yes.

Q. Had the heat been turned on in the place before you left? A. No.

Q. And I believe you quit December 13th?

A. Right.

Q. And was the floor frozen at that time, that is, the outer floor—was that frozen when you left?

A. Yes, it was frozen solid then.

(Testimony of Charles E. Wyke.)

Q. I believe you were asked about the specifications. I will ask you if you agreed with this in your work as supervisor—that this is necessary——

Mr. Arnell: If your Honor please, I think the specifications speak for themselves. Whether he agrees or disagrees is immaterial. You are asking for his opinion—whether he agrees with it or not.

Mr. Bell: Well, he is an expert.

Court: You may ask the question. Don't answer it immediately. [444].

Q. I am reading from IV-03: "Masonry shall be erected when the temperature is above 32 degrees F. No masonry may be erected when there is a probability of the temperature falling below 32 degrees F. in the next 48 hours. Erection may be accomplished in colder weather if the work is heated and is specifically approved by the engineer. No frozen work may be built upon. Blocks are to be returned at windows and doors." Do you agree that that is a necessary method of making a good wall with concrete blocks, or masonry blocks of any kind?

Mr. Arnell: We wish to interpose an objection. Now, in the first place, Mr. Wyke said he was not an engineer, and only an engineer can qualify to answer that question. I think Mr. Wyke is not competent to pass an opinion upon it.

Court: Overruled. You may say whether that is a necessary method, from your own experience.

Mr. Wyke: Yes, when the weather gets cold, we

(Testimony of Charles E. Wyke.)

always cover the work with canvas, and run heat in it to keep the blocks warm.

Court: I think this was all gone over yesterday, Counselor.

Mr. Bell: I won't go into it again.

Q. Now, Specification B—I wish to ask you, if in laying up those blocks, there was any 5/16th inch round bars laid [445] between the rows of concrete, or pumice blocks, as they were laid up?

A. No, I don't believe so.

Q. Did you ever see any steel rods laid in between the blocks as it was being laid up at all?

A. No, I never.

Q. Were you in a position, if those rods had been used, could you have seen them?

A. Yes, they worked right alongside of us.

Q. I see. Mr. Arnell asked you if you examined the beams to see if red lead was used on the cracked places, or abrasions, and I believe you answered you did not. Is that right?

A. That I did not test these places?

Q. That you did not test any places like that?

A. I tested the beams and rivet heads, and there was no new red lead on them at all.

Q. Was there any red lead, either new or old, on the rivet heads? A. No.

Q. I believe you testified, in answer to a question by Mr. Arnell, that you assisted in the hanging of the 8 by 8 door in the south end of the garage? A. Right.

Q. You said something about reference to the

(Testimony of Charles E. Wyke.)

track. Would you [446] explain what you meant?

A. Well, these tracks come in solid places. They come up by the door and run out. They have to be suspended and braced to hold them in one position, and Mr. Gothberg didn't think that we should take the time to put extra bracing on there to hold them in one place. Consequently, the door, when it went up, could move one way or the other. It was just floating.

Q. Was that condition still there when you left?

A. I noticed one brace on the track, not suspended from the roof.

Q. When did you notice that?

A. A week ago—two weeks ago.

Q. Is that on the back door?

A. It is on the small door.

Q. Would you tell the jury how that is put on there—on the 8 by 8 door?

A. We suspended the track with two-by-fours, nailed to roof joists, and I noticed one at an angle to hold one track in place from the roof.

Q. How far is the track below the roof?

A. Probably eight feet, maybe.

Mr. Bell: You may take the witness.

Recross Examination

Q. (By Mr. Arnell): [447] Mr. Wyke, you have testified that you were employed as a carpenter there on the job? A. Right.

Q. Did you spend your time carpentering, or inspecting the laying of blocks as they went in?

(Testimony of Charles E. Wyke.)

A. I worked with these men. I know them all.

Court: Answer the question.

A. No, I didn't inspect the building—no.

Q. When you said then, in response to one of Mr. Bell's questions. about these rods that were laid between the blocks was to the effect, "I don't believe so", you actually don't know whether they used or did not use the rods, do you?

A. I never saw any on the job. I don't know whether they used any.

Q. You don't know whether they did or didn't use them?

A. As far as I know, they didn't use any.

Q. Were you watching all the time to determine if they did or didn't?

A. No, but they lay this webbing in there, and you can see it at any stage of construction.

Q. Webbing or rods?

A. Steel webbing is what they use.

Q. You testified, now, that none was used?

A. As far as I know, no, there never was any on the job. [448]

Q. Do you mean to infer to the jury that because you didn't see it, the rods were not used?

A. I was there when the blocks were being laid.

Q. And it is your testimony there were none used? A. Right.

Q. Mr. Bell asked you about the two doors. I will ask you, Mr. Wyke, were those installed in accordance with the plans and specifications, if you know? A. I don't believe they were.

(Testimony of Charles E. Wyke.)

Q. Why not?

A. Because they were not the doors that were designed for that opening.

Q. The design of the door has nothing to do with the manner it is hung, does it, Mr. Wyke?

A. Yes, it has. Most of these doors are of a standard type, but there is different construction and different installation.

Q. Do you know what type of door was called for by the specifications?

A. No, I know at the time that Mr. Gothberg said he couldn't get what he wanted and he had to take what he could get.

Q. Did the specifications call for a 12 by 12 door?

A. That is the size of the opening. It must have been what it called for.

Q. Did the specifications specify the type or make of door? [449] A. I don't know.

Q. When you say that the doors were not hung in accordance with the specifications, Mr. Wyke, actually you don't know, do you?

A. I was saying that we had to hang the door that Mr. Gothberg could get, because he said he couldn't get what he wanted.

Q. Well, was the door hung in accordance with the specifications?

A. It was hung in accordance with the instructions that came with the door.

Q. You testified to a number of cracks on the walls. How was that mortar mixed out there?

(Testimony of Charles E. Wyke.)

A. On the job?

Q. Yes.

A. I don't know about the lower half, but the upper half was 1-1-6 mix.

Q. Will you refer to each part you are talking about, please?

A. One part mortar cement, one part lime, and six parts sand.

Q. Was anything else used?

A. Sodium chloride, I believe, was used after the freezing weather came.

Q. Was hot water used in the mix?

A. Yes, they heated water in the building with a small fire they had to keep the water from freezing.

Q. I will ask you, Mr. Wyke, what is the tensile strength of [450] mortar mixed 1-1-6, if you know?

A. I don't know.

Q. Do you know the tensile strength of pumice block? A. I don't know.

Q. In other words, you don't know whether the tensile strength of mortar is greater than the block, or whether the block strength is greater, do you?

A. No, I don't know.

Q. If a block had cracked through the middle and the mortar still adhered solidly to the block, would that indicate to you that the mortar was stronger than the block?

A. Not necessarily, no.

Q. Would it indicate to you that the mortar properly adhered to the block? A. No.

Q. What would it indicate to you, then?

(Testimony of Charles E. Wyke.)

A. It would indicate that the break coming through the wall there, around each end of the block, was greater than the weakness of the crack going around the blocks. In other words, it goes through the area of least resistance through the block.

Mr. Arnell: That is all.

Mr. Bell: May I ask one question. He asked about the webbing. I hadn't heard about that.

Redirect Examination [451]

Q. (By Mr. Bell): What is the webbing that Mr. Arnell referred to?

A. It is steel rods that runs parallel, generally of about 3/32nds inch thickness, or 1/8th inch—and in between these two there is diagonals of more steel weld to these two parallel rods, generally about six or eight inches wide.

Q. If that is in the wall, would that prevent cracks going up and down through there, normally?

A. Normally, yes.

Q. That, I believe you told Mr. Arnell, was not in the wall? None of that was in the wall?

A. No.

Mr. Bell: That is all.

Recross Examination

Q. (By Mr. Arnell): Mr. Wyke, will you explain the difference between web and pencil rods?

A. Are you referring to snap ties as pencil rods?

Q. No, I am referring to rods used to tie block.

(Testimony of Charles E. Wyke.)

A. Pencil rods are generally used in your frame work—what is called pencil rods—they are not used in block work.

Q. What would you call the rods laid in the blocks?

A. I have never seen that operation, where they used short rods.

Q. Do you know what the specifications called for in this case? [452]

A. I know it is standard procedure to put reinforcing in on every third course on any type of block work.

Q. Would you answer my question, Mr. Wyke, please?

A. Do I know if it was put in there?

Q. Do you know what the specifications called for?

A. Not on this particular building, no.

Mr. Arnell: That is all.

Mrs. Curtiss: During the time that you were a contractor for yourself, did you do your own estimating?

Mr. Wyke: Yes.

Mrs. Curtiss: Well, then, if you did your own estimating, why did you find it necessary for Columbia Lumber to estimate material?

Mr. Wyke: So that I was sure I didn't make any mistake on it, and also to check the price of lumber that year.

Mr. White: I would like to know what snap ties are?

(Testimony of Charles E. Wyke.)

Mr. Wyke: Snap ties are used to hold frames together, especially plywood frames. You drill a hole through the frame on each side, and the rod goes on and it is run through the wall before the concrete is poured. Two buttons are put on each end on the outside of the frame, and these are tightened down. When the concrete is poured, it pours all the way down, and these hold the frames from pushing out. You have push on each side, and after the concrete is set up, the buttons are unscrewed, and they pull those out of each end—and when the [453] forms are removed, these rods are sticking out of the wall, and when the frame is removed, these can be pulled out—that is why we call them snap ties.

Miss Wise: Yesterday you said something about a 14-foot pole. Well, how high is the wall?

Mr. Wyke: Approximately 12 feet high. You have to have a stick longer than the frames to have something to make sure the concrete is down there.

Miss Wise: Where in the building was that?

Mr. Wyke: This was on the front of the building—on the northeast corner.

Mr. Kurtz: About what time of the day did that occur? Was it much after 5:00 o'clock, or was it at the regular quitting time?

Mr. Wyke: No, that was the very first part of the pour. It happened about probably 1:00 o'clock, or 1:30.

Mr. Kurtz: Then, apparently, that stick must

(Testimony of Charles E. Wyke.)

have been in there from that time on until the next morning, when it was discovered?

Mr. Wyke: Right, and the concrete had frozen or set up. It was in there solid.

Mr. Bell: May I ask one more question about that?

Redirect Examination

Q. (By Mr. Bell): What happened to the stub of the stick that stuck up above [454] the concrete? What did you do about that?

A. I don't know. I came later and I noticed it had been broken off close to the concrete.

Mr. Bell: That is all.

Court: Ladies and gentlemen of the jury, you will remember the admonition of the Court as to your duty, and the court will stand in recess for 10 minutes.

Whereupon the court at 3:02 o'clock, p.m. recessed until 3:12 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present. Another witness may be called.

Mr. Bell: We would like to call Mr. Victor C. Rivers.

Whereupon,

VICTOR C. RIVERS

was called as a witness on behalf of the defendant, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bell): Will you state your name, please?

A. My name is Victor C. Rivers.

Q. Are you a registered and professional engineer? A. Yes, sir, I am.

Q. What school are you a graduate of, Mr. Rivers?

A. Well, I went two years to the University of Washington, and one year to Northwestern for a degree in civil engineering, [455] and McKinley College of Engineering in Chicago.

Q. How long have you been practicing at your profession? A. 21 years.

Q. How long have you lived in Alaska?

A. I have lived in Alaska all except 11 years of my life, I am 48 years old—37 years.

Q. And your office is in Anchorage at this time?

A. Yes, sir, it is.

Q. Mr. Rivers, were you employed to make specific examination, I will say, of the building known as the Nash Garage here in the town of Anchorage?

A. Yes, sir, I was.

Q. Did you do that? A. Yes, sir, I did.

Q. I hand you a report and will ask you to state if this is the one you prepared?

A. This is a copy of an analysis of the plans and specifications and contract documents, and appraisal

(Testimony of Victor C. Rivers.)

of the building known as Nash Garage. I prepared it—it appears—from the seal and my signature.

Q. And that was furnished to Mr. Carr, was it not? A. That was.

Mr. Bell: We think it will save time and may be convenient if we can have it before the Court and the jury. I will give you one to use. [456]

Mr. Arnell: I wish to interpose an objection. It is not the best evidence. Mr. Rivers is here in court and has come to testify and I think, for that reason, counsel should be required to continue his examination, bringing out points he intends to stress to the jury.

Mr. Bell: I intend to do it. I thought it would be handy to have it before your Honor and Mr. Arnell.

Mr. Arnell: I thought you offered it.

Mr. Bell: I do offer it.

Court: The objection will have to be sustained at this time.

Mr. Bell: All right.

Court: It may conceivably, at some time, be admissible to illustrate the testimony of the witness, the same as financial reports, but not now.

Q. Mr. Rivers, I am referring to page 4 of the report, and ask you to state whether or not the specifications were presented to you, and all of the plans, and the contract?

A. The specifications and plans were presented to me in complete form, and many of the plans—eight of the ten plans—bear the initials "V.G.", and many of the sections of the specifications bear

(Testimony of Victor C. Rivers.)

pen and ink initials "V.G." Mr. Carr stated they were the original specifications and plans, and that "V.G." represented the initials of Mr. Gothberg.

Q. And you had those before you during the time that you were [457] working on the report, and also the examination?

A. That is correct. I had the plans and specifications on August 16th, and made an inspection on August 19th and August 25th.

Q. Will you tell the jury whether or not there was such a section, GC-19, at page GC-6, concerning the correction of work before final payment? I call your attention to page 4 of your report.

Mr. Arnell: If your Honor please, I think this question is immaterial. The specifications are in evidence, and whether Mr. Rivers thinks that this particular paragraph was or was not included is immaterial. It is a waste of the Court's time, and the jury's time, and our time, too.

Court: Did you read all the specifications?

Mr. Rivers: Yes, sir.

Court: The objection is sustained.

Mr. Bell: Exception.

Q. Does Paragraph BC-19, as set forth in those specifications, carry about the same requirements that is approved by professional engineers normally in buildings of this kind?

A. It is almost a standard clause in general conditions of any contract for construction.

Court: If counsel means to qualify this provision, he can read from the specifications so the jury

(Testimony of Victor C. Rivers.)

will know what the witness is talking about. The specifications are in evidence. [458]

Mr. Bell: Yes sir, they are, your Honor.

Court: I don't know just what is being approached.

Mr. Bell: It is going to be hard to find in here —it's easy this other way. I was trying to save time.

Q. Mr. Rivers, I am reading from GC-19: "Correction of work before final payment. The contractor shall promptly remove from the premises all materials condemned by the engineer as failing to conform to the contract, whether incorporated in the work or not, and the contractor shall promptly replace and re-execute his own work in accordance with the contract and without expense to the owner, and shall bear the expense of making good all work of other contractors destroyed or damaged by such removal or replacement." Now, is that the standard clause—I believe you stated it was?

A. Yes, approximately, it is.

Q. Now, I will ask you about this clause following: "If the contractor does not remove such condemned work and materials within a reasonable time, fixed by written notice, the owner may remove them and may store the material at the expense of the contractor. If the contractor does not pay the expense of such removal within ten days' time thereafter, the owner may, upon ten days' written notice, sell such material at auction or at private sale, and shall account for the net proceeds thereof, after deducting all the costs [459] and expenses that should

(Testimony of Victor C. Rivers.)

have been borne by the contractor." Is that one of the regular standard clauses that are used ordinarily by professional engineers?

Mr. Arnell: If your Honor please, I wish to interpose another objection on the grounds that this is immaterial. The contract is in evidence before the jury. It is an agreement of the parties. Whether this is incurred in another contract, or not, is really immaterial. I think it is time consuming and not beneficial to the jury.

Court: Overruled. He may answer.

Q. Mr. Rivers, you have filed in your report, on page 5, reference to cleaning up. Now, what was the condition that you found around the building after you went there, with reference to being cleaned up.

A. Do you want me to answer the previous question first?

Q. Yes. I thought you did. I am sorry.

Court: I would like to know when Mr. Rivers made his inspection. He said August 19th?

Mr. Rivers: August 19th and 25th.

Court: Of what year?

Mr. Rivers: 1952—of this year.

Court: All right. You may answer.

Mr. Bell: He had not answered the previous question—if that clause was ordinarily a clause used by engineers in Alaska? [460]

A. It is essentially a standard clause. The wording differs slightly, but the owners are to finish the work. That is in practically all contracts of this nature.

(Testimony of Victor C. Rivers.)

Q. Now, Mr. Rivers, when you went there to make these two inspections, were you familiar with GC-39, on page GC-10, which reads as follows: "Cleaning Up. The contractor shall, as directed by the engineer, remove from the owner's property, and from all public and private property, at his own expense, all temporary structures, rubbish, and waste materials resulting from his operations." You had read that before you went to the premises?

A. Yes, sir.

Q. Is that an ordinary and standard clause used in Alaska by professional engineers?

A. It is a standard clause for cleaning up building waste, rubbish and making the building clean.

Q. When you went there in August of this year, what did you find in relation to that cleaning up?

A. Well, there had evidently been very little, if any, clean-up work done. There was a considerable amount of debris at the south end of the building.

Q. You have referred to that in your report, on page 5, have you not?

A. I referred to that cleaning up clause. I refer to the clean-up not being done, on page 8 of this report. [461]

Q. What about the formation of the foundation walls, or the workmanship of the foundation walls? Did you examine them?

A. I examined the part above ground that was visible.

Q. What was the condition of those walls?

A. The concrete was fairly uniform in quality,

(Testimony of Victor C. Rivers.)

and there were certain cracks that may have been expansion cracks. The foundation walls had been touched up here and there, where they had porous spots, but the wall ties had not been properly broken off and removed, nor had the holes been welded. The concrete was in what we would consider more or less unfinished final form. The specifications do not call for any finished trowel service, but they do call for imperfections being troweled over and smoothed off.

Q. Would you call the work on that foundation good workmanship?

A. As far as I could see, the workmanship I could see above the ground appeared to be adequate for the purpose. I can't tell what was below the ground. I don't know the size of the footings they put in under the building.

Q. Was it finished up in a workmanlike manner?

A. No, it was not completed work.

Q. What about the floors?

A. I inspected the floors as called for in the specifications. It was a monolithic type of pour and the specifications, as I recall, called for a grade to the drains of 3/16th of an inch to the foot. The standard practice is to allow [462] one-eighth to one-quarter of an inch to the foot for this type of use. At the time I was there—it was a wet day the first time and the second time they had been washing cars in there—and there were some bad depressions in the floor—some as such as one-half to three-quarters of an inch deep, which were full of water, and instead of draining to the floor drain at two par-

(Testimony of Victor C. Rivers.)

ticular points, the grade was evidently in the opposite direction.

Q. What about the condition of the floor in the boiler room?

A. The floor in the boiler room, at the foot of the stairs, is low. It grades away from the drain about an inch and a half. It is lower where it should drain to the drain. Then, at the point of drainage, which is behind the boiler itself, there is about one and one-half inch differential in grade in the wrong direction.

Q. Then, would it ever drain if it was left to nature to take care of it?

A. No, it couldn't drain.

Q. Then the water would remain there?

A. That is correct, yes.

Q. Until it evaporated? A. Yes.

Q. What about the topping on this floor? Is there any place which is loose?

A. Well, along the front wall of the show room there is some [463] evidence of faulty concrete. It has been painted over now, but it is scaled off in a number of places. It could have been caused by the grade of concrete used or by freezing, but in places along the front show window, part of the floor slab surface has scaled off or given away.

Q. What kind of finish would you call the floor in the garage?

A. It is called a monolithic type of floor. That means where you pour your floor it is finished, while the whole slab is still wet.

(Testimony of Victor C. Rivers.)

Q. Is there trowel marks, and uneven places, over the greater portion of that floor?

A. Yes, the floor is a very rough finish job. It is not finished in accordance with proper grade or quality of workmanship.

Q. What is necessary to do to that floor of the garage before it would be in compliance with the plans and specifications?

A. Well, I would require that that floor be refinished. Now, there's two or three ways it might be done, but if I were going to require that floor to be put in suitable condition, I would require that the top two or three inches of the floor be removed, and that it be refinished with concrete, and have it drain towards the drains.

Q. How do they do that, Mr. Rivers, in removing the top of this floor?

A. Well, that would have to be done with the use of machinery—[464] a compressor, a jack hammer or regular crushing machinery.

Q. Is that rather expensive work?

A. Yes, sir.

Q. Do the concrete floors in the show room comply with the requirements of the specifications or good workmanship?

A. There is a considerable number of trowel marks—rough finish there—there is some paint over it now and that tends to make it look a little smoother, but there are imperfections, especially along the front windows where, as I say, it is scaled off and has been painted over.

(Testimony of Victor C. Rivers.)

Q. Did you inspect the structural steel?

A. Yes, sir, I did.

Q. What did you find from your inspection there?

A. Well, I found the structural steel, as far as its erection goes, adequately complies with the plan.

Q. What about the painting of it?

A. I went over the steel in various places with a pocket glass, and I scratched the surface and found manufacturer's priming on the steel, and what appeared to be, upon microscopic examination, what appeared to be one coat of aluminum paint. The paint was very thin and there was no evidence, with a pocket glass, of any two layers of aluminum paint. I also inspected some of the connections. The specifications called for field connections, which are bolts or rivets or welds, to have a coat of red lead or two coats of other paint, and [465] selected by the owner. The connections I checked—five connections of that nature—I scratched them and found no evidence of red lead or any other rust resistant prime on those connections. There was, however, on those what again appeared to be one coat of aluminum paint.

Q. Did you find, Mr. Rivers, any which the paint has left the steel and it is now rusting?

A. Yes, I found some such places.

Q. Did you examine the masonry?

A. Yes, sir, I did.

Q. Would you tell the condition of the concrete in the blocks that were used there?

(Testimony of Victor C. Rivers.)

A. Well, I examined the walls above the foundation which were composed of pumice blocks; the specifications called for cinder concrete blocks. Those pumice blocks had been set in a rather high percentage of lime mortar—that is evident from the color of the mortar. What the exact percentages are, I have only heard what was testified here. It was also evident that some amounts of calcium chloride were used in the mortar at places. In these concrete walls the laying up of the pumice block has been done with considerable uniformity of joints, and the joints have been pounded in accordance with the specifications. The walls are fairly plumb and fairly true—they are slightly wavey, but not any more so than would be considered acceptable. There [466] seems to be fairly uniform pattern of grounding. The walls are cracked from the top down, and from the bottom up, at about 12-foot intervals on all walls. That would appear to me to be expansion and contraction type of crack. On the front wall, where a diagonal corner of the building takes off, there is definitely one large crack, evidently caused by some shifting of the foundation after the wall was built, at least by movement of the wall more than a temperature crack. Over the window on the south wall there is a concrete beam, and above this concrete beam are four-inch blocks, evidently, and in the next joint above that is an opening you can stick a pencil through—it is evidently caused by the beams separating.

Q. Did you examine the mortar to see whether

(Testimony of Victor C. Rivers.)

or not it had the appearance of having been frozen?

A. Yes, I did. It looked to me like in all probability that joint over the rear window had been frozen, but it is pretty hard to tell, with lime mortar. The specifications call for cinder concrete block and 1-3 cement sand mortar. They evidently used a larger percentage of lime. In my opinion, if this building was done under the temperature conditions that have been stated, the only thing that saved that concrete block at all is using lime mortar.

Q. Mr. Rivers, which is the stronger of mortars, if the weather was so it could be laid—that is, above 32 degrees? Would [467] the 1-3 mortar which, as I understand you to say, is one part cement and three parts sand, be weaker than the 1-1-6 mortar which you heard the witness testify was used?

A. Well, in a case like that, the cement mortar would make a rich cement mix, and you would get concrete that would probably yield about 4,000 pounds pressure to the square inch. The lime, up to 10%, will not reduce the strength of the mortar. We allow up to 10% lime with concrete mix to make it trowel better, but above that, lime does weaken the strength of the mortar. However, a good lime mortar is still acceptable for certain uses. It is used in setting brick almost exclusively, as you probably know.

Q. Now, you have referred in your report on the masonry, on page 6: "The concrete block masonry was inspected, and on the south wall, over the steel sash opening, the mortar was in a partially disintegrated state, and failed to make a satisfactory

(Testimony of Victor C. Rivers.)

bond with its adjoining concrete blocks. This section of the wall should be removed and relaid to conform to suitable workmanship standards." Now, Mr. Rivers, what do you mean by that, on page 6 there, would you explain that, please?

A. I meant those blocks immediately over the window opening on the south wall should be removed and replaced with proper standard of workmanship in order to be acceptable. The wall does have a hole in it, and the hole is of some [468] extent and it is not good workmanship. It is not acceptable.

Q. Is that in such a condition that, if we should have a rather definite earthquake and cause a tremor, as you have seen in Alaska in your years, what might be the result of that wall? Would it fall or would it not?

A. I am very doubtful if, under the tremors I have seen here, that that wall would fall. The building is a steel sketeton building and the walls only have to carry their own weight, and they are fairly well tied into the steel skeleton of the building with ties into the blocks every so often.

Q. What is the effect of the heat of the building by these holes in the wall? Does the heat go out through them or not?

A. Oh, yes, there is heat lost there, yes, sir.

Q. Now, with reference to the builder's hardware and miscellaneous metal. Tell us about the outside show room door—what did you find there?

A. Well, the builder's hardware is specified to be

(Testimony of Victor C. Rivers.)

brass hardware. I found the hardware in the outside doors to be brass plated steel hardware, including the door closer. They are already showing signs of rust and deterioration. It is installed loose, apparently, and not a good fit, and not up to an acceptable standard. [469]

Q. What about the kick plates?

A. There was kick plates called for, and push plates that was to be on both sides of the door. There is kick plates only, and no push plates. They have kick plates on only one side of each door.

Q. What is the condition as to the installation of the trimmings on these doors? Are they loose, or are they tight and normal?

A. You mean the jambs and casings?

Q. I mean the trim you have referred to as kick plates, and locks and knobs. Are they tight?

A. The kick plates are screwed on tight. The knobs are not properly adjusted—I believe they could be, with a little careful handling, made much more satisfactory in their operation.

Q. What about the inside door hardware?

A. The inside door hardware on the three different doors connecting the garage to the show room is not as specified. You have three doors, but the hardware called for two of those to be on an overhead track—a rollaway. There is no such thing there. It is just standard plain brass plated hardware of a rather average quality. Also, on the interior doors, which are installed in the partitions, they have some hardware. The locks and knobs and latches are very

(Testimony of Victor C. Rivers.)

loose, and I am not sure whether they were installed [470] under this contract we are speaking of or not, although Mr. Carr told me they were taken off the front doors and put back there. They are bathroom type hardware, not front entrance hardware.

Q. Were the materials and the workmanship on these inside doors, and the hardware, up to standard acceptable workmanship?

A. They are not in accordance with the specifications, and on that ground I would say they were not up to an acceptable standard.

Q. And is there any doors in there at all that were hung on the overhead tracks, as the specifications called for?

A. Well, the big overhead garage doors are both on overhead tracks.

Q. But I am referring to the inside doors in the partition?

A. No, none of those are on tracks with rollers.

Q. And the specifications—do they or do they not call for rolling doors, or sliding doors?

A. They called for two of those doors between the garage and the show room to be on an overhead track with suspended roller.

Q. I believe you stated they are not there at all?

A. That is not there.

Q. What about the two-way swinging door. Is there any two-way swinging door between the garage and the show room? [471]

A. No—might I elaborate on my answer? I do not recall if the plans or specifications called for

(Testimony of Victor C. Rivers.)

either of those doors to be double acting or a double spring door.

Q. But is there anything like that there?

A. No, sir, not to my knowledge.

Q. Now, what about the carpentry and mill work. Take the metal store front sash and metal factory sash. Would you please go into detail on that?

A. Well, I checked the plate glass and the store front sash. The plate glass appears to be of uniform size, but it doesn't fit the openings. I checked the size of them and the glass itself and it is apparently of a uniform size. However, the glass does not fit any openings provided for them, and in two places, along one side, there is a substantial crack, from nothing to one-eighth of an inch, and there is wooden shims in there to keep it from falling out. The metal sash itself, which is supposed to be the store front sash, is composed of two different types of material, evidently gathered from two different sources and installed with a good many hammer and tool marks on it, and it is apparently aluminum. It is what they call this weatherproofed aluminum, and they have used a small nail around the outside, an ordinary steel nail, which has now rusted. It is very, very poor workmanship. It doesn't fit the openings, and it is not accepted standard of [472] material for that use, and some of the stops on the inside of that glass have not yet been installed. They are still missing.

(Testimony of Victor C. Rivers.)

Q. What do the specifications require the backs of the jambs to be bedded in?

A. In the outer doors they are supposed to be bedded in white lead, according to the specifications.

Q. Are they installed that way?

A. No, there is no evidence that they were, and you can see in along the cracks for the full depth of the jamb in two or three places.

Q. Was there any lead between the window jambs and the concrete or block work surrounding them.

A. There is no evidence of it—none that can be seen.

Q. I wish you would explain what you mean by this: "The metal store front sash utilized in these openings is of a makeshift nature, consisting partly of extruded and partly of rolled sections."

A. Well, an extruded section is an ornamental piece drawn through an opening; another type of ornamental metal is rolled through rollers of the shape you want. They have used both of these on this front. It is not the same as manufactured provided for the installation, in that it is gathered from two different sources, and doesn't match well, and doesn't look well. [473]

Q. Does that come up to ordinary standards of good workmanship?

A. No, sir, I wouldn't approve it.

Q. You say, also, on page 7: "It has been poorly fitted and installed and shows tool marks and irregu-

(Testimony of Victor C. Rivers.)

larities not in keeping with acceptable workmanship." Would you please explain that?

Mr. Arnell: If your Honor please, the document is not in evidence and I think he ought to ask direct questions.

Court: Does counsel object?

Mr. Arnell: Yes.

Court: The objection is sustained. Counsel may invite the attention of the witness to a page and ask, that the witnesses' recollection may be refreshed. It is out of order, but it may be done.

Q. All right. Mr. Rivers, would you look at the third paragraph down, on page 7, starting with the word "metal", and would you explain what you mean by the statement in your report?

A. Well, that is essentially what I have just answered—that the metal store front sash is composed of two different types and poorly installed, and the sash doesn't fit the glass, although the glass is all the same size. They are neither uniform in points nor are they square. Secondly, the store front sash shows a lot of tool and hammer marks [474] and are nailed with ordinary wire nails which are now rusted, and it is not acceptable work. It is very rough.

Q. What about the next section down, commencing with the words "The factory type"?

A. Around the rear of the building they have used a steel sash, which is called industrial type of sash, and that is a steel frame which it fitted into the opening, and ordinarily, when they form around a window opening, they have a special kind of con-

(Testimony of Victor C. Rivers.)

crete block so the window goes together, and it is then fastened in two places. These industrial sash, around the south and the east walls of the building, are not well fitted. The openings vary in size and the sash themselves are loose, and they have been corked up with plastic corking which is very poorly put on and is a very sloppy job.

Q. Would you consider them a standard of workmanship, or below standard?

A. I would consider it below an acceptable standard of workmanship.

Q. Are those windows sufficiently anchored in that wall?

A. That I couldn't tell. I can say this—that there are two of them that are loose. Whether they are sufficiently anchored to stay there, although they are loose or not, I don't know.

Q. What about the electrical work referred to on page 7 of [475] your report, starting with the words "Marquee lighting——"?

A. I went over the electrical work and I noticed a number of small items in the building. For instance, the little cover plates that are ordinarily on an outlet or switch, in some instances are missing. And the marquee lightning—there is a recessed fixture which does not have either a bulb or directional glass cover on it, and the socket has not been connected. I couldn't tell whether it was a complete circuit or not, but there again the work has not been brought to a proper finish, and that would should be done before the electrical work is accepted.

(Testimony of Victor C. Rivers.)

Q. Now, the plumbing, Mr. Rivers, referred to on page 7, the recond paragraph from the bottom?

A. Well, in regard to the plumbing, the specifications called for all manufactured new material, and the floor drains in the garage, I noticed them; they had a homemade cover on them—it's just a matter of steel plate punched. I asked Mr. Carr on the first trip how that occurred, and he said the original covers broke as soon as they were run over. The present covers are homemade and just ordinary pieces of sheet metal punched.

Q. What about the hot and cold water pipe installation?

A. The specifications called for the hot and cold water pipes to be given a coat of paint and then insulated in their entirety. The cold water pipes are not painted and are [476] not insulated, and I would say approximately one-half of the hot water pipes have been properly covered with insulation.

Q. Would that have to be done to make an acceptable job?

A. Well, under this contract and these specifications, it is so specified. I don't always cover the cold water part myself, but it is sometimes inclined to sweat if you don't cover it.

Q. And the cold water pipes were not covered at all? A. No, sir.

Q. I believe you said they were not even painted?

A. Neither of the pipes have been painted, that I was able to determine, anywheres.

(Testimony of Victor C. Rivers.)

Q. What about the heating, Mr. Rivers, referred to on page 8 of your report?

A. The heating authorized in the plans and specifications—in the front sales room there were four directional unit heaters, each one of which is shown as controlled by a thermostat. Now there are, if my memory serves me, there are two thermostats. The other two registers are controlled by a three-way switch—slow, medium, and high speed switch—and that is just a wall switch. There is a slight variation there from the specifications, and it may or may not have been accepted at the time that work was put in. In regard to the other parts of the work, it calls for insulation [477] and covering of the pipes. Now, in most cases they have been covered, but they have not yet been completed.

Q. Now, Mr. Rivers, would you please explain to the jury why the specifications called for four thermostats or, that is, one for each of this particular type of heater, and explain to them why the four thermostats are necessary to keep all parts of that room warm or taken care of evenly?

A. Well, there is considerable travel through that show room from the garage in the rear and also from the street, and my interpretation of the designer's idea would be, that as these doors open, it got cool in the corner toward the front door—I mean around that unit heater, and it was to cut in and run for awhile to keep this temperature uniform. That would not necessarily require the unit heater in the rear to operate at the same time. The

(Testimony of Victor C. Rivers.)

present installation, in part at least, defeats the intent under which that was originally planned.

Q. The way it is now, as I understand it, Mr. Rivers, one portion of the building cannot have additional heat to compensate for the greater exposure to cold, by opening of the doors and so on, without heating the parts that are already sufficiently warm? A. That is correct.

Q. How about the painting on the heating pipes? Has there been any paint on them? [478]

A. Well, heating pipes are ordinarily wrought iron or black pipes. Where they are going to be covered, I don't recall that these specifications called for any painting before covering. I did not see any evidence of painting having been done.

Q. Is it required, for good standard workmanship, to first paint those pipes before you put the covering over them?

A. No, it isn't. Many times wrought iron pipe comes from the factory with a coat of enamel on it, but not always.

Q. Mr. Rivers, have you estimated the cost of fixing this floor, the way you have described it, by taking out the top two or three inches of the floor, and then reinstalling them in a workmanlike manner—have you figured what it would cost to do that?

A. Yes.

Q. What would it cost?

A. I figured it could be done for $1.00 a square foot, taken out and an additional floor put in.

Q. How many square feet are there in there?

(Testimony of Victor C. Rivers.)

A. 5,000—let me see, that's 50 by 100, as I recall —the building, is that correct?

Q. That's right.

A. Yes.

Q. Now, Mr. Rivers, what would it cost to go down in this boiler room and do what was necessary to fix that boiler [479] room floor? Would it be necessary to move the boiler and heating equipment, and all of that stuff, before the floor could be fixed?

A. No, I think if the low part were just built up to a suitable level it would serve the purpose.

Q. And would that necessitate breaking out part of the concrete to do a fair job?

A. No, I think it could all be filled in with new concrete.

Q. Fill the whole floor?

A. Well, it would just be at the foot of the stairs, not the whole floor of the boiler room—the foot of the stairs—if that were done it would run down into the floor drain.

Q. Mr. Rivers, how large is that boiler room, approximately?

A. The boiler room is about 8½ by 10, probably.

Q. Mr. Rivers, what would be the cost of putting in, at the same time you are putting in the foundations walls, what would be the cost of putting in two walls like you observed as the north wall and east wall in the boiler room? What would be the approximate cost of installing those two walls?

A. The north and east walls?

(Testimony of Victor C. Rivers.)

Q. Of the boiler room. I believe you said that was 8½, less the stairway——

A. Yes.

Q. What would be the reasonable cost for installing those [480] walls five or six inches thick?

A. Are they six inches thick?

Q. I think they are four, but I was giving them the benefit of it.

A. Well, in estimating that, we ordinarily figure on form work at 50c a contact foot, that is, the form on each side and the cost of the steel and the concrete. The concrete purchased and placed probably could be put in there for about 40c a yard, and the steel for around $1.30 a ton.

Court: While the witness is calculating this, we will take a recess. The jury will remember the admonitions of the Court as to duty, and the court will stand in recess for 10 minutes.

Whereupon the court at 4:07 o'clock, p.m., recessed until 4:17 o'clock, p.m., at which the following proceedings were had:

Court: Without objection, the record will show all members of the jury present and counsel may proceed with examination.

Q. Mr. Rivers, you referred to windows and the openings in the front of the building being out of square and not fitting. If you were to make these openings in a workmanlike manner, would it be necessary to tear the wall down and rebuild it to make them correct? A. No. [481]

Court: The last question propounded was not

(Testimony of Victor C. Rivers.)

fully answered. Would the Reporter read the last answer?

Reporter: "Well, in estimating that, we ordinarily figure on form work at 50c a contact foot, that is, the form on each side and the cost of the steel and the concrete. The concrete purchased and placed probably could be put in there for about 40c a yard, and the steel for around $1.30 a ton."

Q. Mr. Rivers, did you figure those two walls to be the one that is in the north end and the one in the east end of the boiler room?

A. Yes, I figured the forms at $1.00 a foot, the steel, 30c, and concrete $1.00—$2.30 a square foot of wall space. Now, that wouldn't reflect the cost of the excavation or backfill—just the wall itself.

Q. How thick a wall did you figure?

A. I figured on the basis of an eight-inch wall.

Q. Would you tell us how many dollars it would normally cost, ordinarily cost, to put those two walls in?

A. Well, I didn't quite follow the size of the wall.

Q. I think the wall is eight feet high, I believe, and the size you mentioned——

A. About 10. I don't have the exact size in mind —approximately eight feet high—that would be 80 quare feet on one wall, and about 68 square feet on the other.

Q. Well, now, on that 148 square feet, what would that cost [482] normally to put that wall in?

A. Roughly, around $340.00.

(Testimony of Victor C. Rivers.)

Q. And what part of that $340.00 would be steel rods?

A. I figure that wall would require approximately two pounds of steel per square foot, and figuring this steel actually in place, at 15c a pound, it would be 30c a square foot.

Q. For 148 quare feet? A. Yes.

Q. And if that rod was not used, then the wall would be that much cheaper, is that right?

A. Well, you would hardly dare put it in there without steel because the weight of the backfill would cause the wall probably to fail—at least it would not be a safe wall without it.

Q. And if this one is built without steel, then it would be your opinion that it is not a properly built wall? A. That is correct.

Q. Then about $44.40 of that wall would be for steel, and the rest would be forms and concrete, and so on? A. That is correct, yes, sir.

Q. So it would be a little less than $300.00 if it develops that the steel had not been used in the wall? A. Yes, that is correct.

Q. Now, Mr. Rivers, you spoke of raising the floor at one side of the boiler room so that you could make the water drain [483] back toward the drain in the floor. If you did that, would the fire door interfere?

A. Yes, the fire door would either have to be raised or cut off; the fire door is a metal covered door called a calmine type door. That type of door has wood with metal over it to resist fire—probably

(Testimony of Victor C. Rivers.)

four or five hours—it would have to be cut off or raised whatever amounts you raised the floor under it.

Q. What amount would have to be cut off that door?

A. Probably an inch and a half—maybe two inches.

Q. Mr. Rivers, what would be the over-all cost, or what, in your opinion, would be the estimated cost of fixing that boiler room so that the water will drain into the regular drainage pipes?

A. That is a pretty hard question to answer with any accuracy, but I would say that $125.00 to $150.00, round figure, would cover the cost of doing that work.

Q. Now, after you got that done, would you have what would be known as a patched up job?

A. Well, it would be prima facie a patched up job.

Q. Yes. Now, Mr. Rivers, you have referred to the windows being loose in the wall around the openings in the back wall. What should be done there to fix that wall up?

A. You mean the block over the windows?

Q. Yes. [484]

A. Well, I believe that a portion of that block over the concrete lintel beam should be removed and replaced. It is possible to wedge block up a crack —put some dry mortar in there—but I wouldn't think that would be a very good patch.

(Testimony of Victor C. Rivers.)

Q. In your opinion, it needs to be torn down and rebuilt?

A. That section over the window, yes.

Q. What, in your opinion, would the repair of that south wall cost?

A. That's pretty hard to say. New concrete block in place now is being set with the blocks bought, and the mortar furnished, and the labor furnished, for around a dollar and $1.50 a square foot of wall space. If you have a large quantity, you can cut it to $1.40 to $1.45 for a small quantity of wall. This could not be considered in the class of new work, but would cost considerably more than that per square foot. I would say, to remove the old block and put in new block, or replace the existing block, a person should figure around $3.00 per square foot.

Q. About how much of that wall should be torn down and rebuilt to make it practical, and stop waste of heat and so on?

A. Probably 30 square feet, removed and replaced, would be enough.

Q. That could be done, you think, for about $90.00 or $100.00? A. I do. [485]

Q. What about re-setting of the windows in that wall. Would they need to be re-set?

A. No, I think they should be firmly secured and anchored.

Q. Can that work be done by concrete men, or would it require the work of a carpenter to handle those windows under union customs?

A. If I were going to repair those windows and

(Testimony of Victor C. Rivers.)

anchor them in place, I would remove the plastic and put in dry mortar and taper it off. I believe that a concrete finisher would be the man who would have to do the work.

Q. What about the east wall that is cracked. How can those cracks be repaired without tearing the wall down, or can they be repaired?

A. That question I have given some thought to —and those cracks appears to me to be temperature cracks. The biggest cracks, and most of them, appear to occur at the top half of the wall. It would seem to me that due to expansion and contraction, and the greater heat at the top on the inside, and the cold on the inside, probably caused those cracks, and they go down straight about 12 feet. The pattern indicates there is a temperature shrinkage. They go right through the joint and the block. They are not stress cracks. A stress crack in concrete walls follows the mortar joints. I might say here that pumice blocks are not made to any accepted or approved standard. [486] We never specify them, and if I have anything to say about it, we will never use them because there is nothing known about what shape they are. It is my opinion that expansion and contraction of this wall has caused these vertical cracks to appear and it is noticeable that near the roof or ceiling of the building, where the greater heat is, the cracks are greater. Whose responsibility that would be is a question beyond my knowledge. It might be an inherent characteristic of the material itself.

(Testimony of Victor C. Rivers.)

Q. Would the laying of this block in freezing weather have some tendency to soften the mortar and make them less firm and cause them to crack?

A. I have scratched the mortar, and the mortar does not have the strength of a cement mortar. As I said before, if you use a substantial amount of lime, those walls could be laid in cold freezing weather, with the proper method worked out. Ordinarily, you heat the block and you heat the sand and you heat the water, and you mix it altogether, and then the inherent heat in the block will stay long enough so that you can cover them. Then they have another canvas they use, or blast heaters, and they can protect them and they can be laid in cold weather—but improperly protected, you have a good chance of failure of your material.

Q. Mr. Rivers, the specifications require that that be laid in no weather colder than 32 degrees, and that they not be [487] exposed to cold more than 32 degrees for four days, I believe it is, or 48 hours, possibly, after being laid. Now, does that wall have the appearance, from what you have examined of it, of being laid in cold, bad weather?

A. Well, from the appearance of the wall, that cannot be determined.

Q. What about the specifications with relation to the fire wall, Mr. Rivers, across between the show room and the garage? Is there any fire wall in there?

A. Well, my inspection indicated a frame wall there covered with, it could be called a fire wall.

(Testimony of Victor C. Rivers.)

It's covered with asbestos board. Whether only one layer or not, I don't know.

Mr. Bell: I believe you can take the witness.

Cross Examination

Q. (By Mr. Arnell): Did you say you had examined the building on two different occasions, Mr. Rivers?

A. Yes, on the 19th and 25th. I have gone by it a number of times, but not to stop and examine it closely.

Q. Mr. Bell has asked you about the cleanup?

A. Yes.

Q. Did you testify that there remained considerable cleanup work to do?

A. I testified that there remained a number of truck loads of [488] debris on the south end of the building—construction debris. I did not state beyond that, I don't believe.

Q. Do you know whether that debris was there at the end of the job, or whether it is the result of some recent activity?

A. No, I can't say when it was there—parts of concrete block, small pieces of concrete and mortar —construction debris—possible six or eight yards—two piles.

Q. There is one pile in the rear of the building, is there not?

A. That is the pile I refer to.

Q. Is that the only cleanup work you refer to in your testimony?

(Testimony of Victor C. Rivers.)

A. That is the only cleanup work I refer to.

Q. Approximately how long would it take to clean that up?

A. Well, it is not big enough to bring a piece of equipment in there. I would say it would probably cost about $4.50 a yard to take it out of there—possibly six or eight yards.

Q. Not in excess of $35.00, probably to remove that? A. Probably not.

Q. Now, you have testified in regard to the foundation walls. Did you testify to the effect that you examined only the part above the ground?

A. Yes, I examined only the part above the ground, except in the boiler room. I was talking about the outside at that [489] time.

Q. Did you examine the west wall, the south wall, and also the east wall? A. Yes, sir.

Q. Did you know at the time you made the examination that a portion of both of those walls—the west and the east wall—had been installed a year prior?

A. I knew there had been some extra work done—what part I didn't know. I was inspecting the condition of the work as I found it.

Q. Were these conditions you referred to in the old portion of the wall?

A. Well, I don't know exactly what the old portion was. I can tell you where the conditions are on the west wall. The wall ties had been left in naked and unmounted. On the south wall the same condition was true, and particularly noticeable in the

(Testimony of Victor C. Rivers.)

beam over the rear windows. On the east wall the ties had been cut—apparently broken off—but most of the holes had never been filled. There was some evidence of a small amount of troweling on that wall, but many of the tie holes had not been properly filled. In the front wall, which is diagonal and a square wall, there was some evidence of some troweling done there, and the holes were apparently filled up.

Q. Now, this type of work that you have just described to the [490] jury, Mr. Rivers, ordinarily is regarded as finish work, is it not?

A. It is finish work, yes, sir.

Q. That would be within the last 5 or 10% of the amount withheld on the contract, would it not?

A. Well, I think that would cover it, yes, if it is not too expensive. Some types of outside finishing on large structures runs into a great deal more than 10%. In this case it would definitely cover it.

Q. This contract was $38,450.00. Do you think it would take $3,800.00 to finish the work you have just described?

A. You mean to put the building in acceptable condition, including all the finishing?

Q. No, we will get around to that later.

A. Yes, I think you could easily do what little I have described within the limit of $3,800.00. That is just cleanup and outside finish of the concrete.

Q. How much do you think it would cost—1% minimum?

A. Well, it's pretty hard to say. I think 1%

(Testimony of Victor C. Rivers.)

would probably cover it for what part we have now described, and I want to limit it to that part we have described—cleanup and outside finish of the concrete walls.

Q. Finishing the outside portion of the building, breaking off the snap ties, and repairing these things you have described to me, and also described to Mr. Bell? [491]

A. 1% would do the work we have talked about—finishing the concrete outside and removing the debris. It would definitely not do the block work we have talked about.

Q. I didn't intend it should include that, Mr. Rivers. In your closing testimony on Mr. Bell's examination, you referred to these cracks. Would those be the obligation of the contractor or the owner?

A. Well, I don't know just how they got the pumice block in this contract. The specifications called for cinder block and they called for 1-3 cement mortar—cement and sand mortar. Now, we find the building down there composed of pumice block, using a coment lime sand mortar. How, just how they arrived on the adjustment on that, or agreement on it, I don't know.

Q. Do you know whether or not, under this contract, Mr. Carr was to furnish pumice block?

A. I read in the first part of this specifications that a considerable number of block were on hand, and they were pumice block, according to that statement. I assume the owner furnished them.

(Testimony of Victor C. Rivers.)

Q. That is the usual procedure in a case like that, is it not, Mr. Rivers?

A. I believe so, yes, sir. I believe it was something he had furnished, and was in addition to the actual contract price. [492]

Q. Under the terms of an ordinary contract, Mr. Rivers, where the owner furnishes the type of materials to be used in the construction, the contractor is ordinarily not responsible for the quality of material used, is he?

A. That would be my interpretation.

Q. Unless there was some faulty workmanship somewhere? A. Yes.

Q. So if there is a failure of blocks by reason of cracking, then, that wouldn't be Mr. Gothberg's responsibility, would it?

A. Failure can occur in many ways. If it is an inherent characteristic of the material it wouldn't be his responsibility.

Q. Did you testify, Mr. Rivers, that the cracks, in your opinion, particularly those towards the top, were temperature cracks?

A. I believe they are.

Q. Would those cracks result from the nature or quality of the pumice blocks?

A. Well, now, if you knew the contraction or expansion of pumice blocks, he could provide proper expansion joints. We always do that in concrete block walls, or concrete walls. Concrete expands in accordance to each degree of temperature change, 67-ten millionths of an inch. In other words, for 15

(Testimony of Victor C. Rivers.)

degrees temperature change, a 1/100th foot piece of steel [493] will change about one-eighth of an inch, so if you have 100 feet of steel change from 50 degrees to 75, you have expansion about one-eighth of an inch. The same is true of concrete, so ordinarily, if we knew what this pumice block expanded and contracted, we would know how far you can go without putting in an expansion joint; but there is no criterion on which we can judge. There is not enough information available.

Q. Would these temperature cracks be the responsibility of the owner of the building, or the contractor, where the owner had furnished the block, or specified that that be used?

A. Well, all things being right in the manner of laying the blocks, the quality of the workmanship —I would say that definitely it was the responsibility of the person who furnished the material. Now, it is hard to say what part of this failure is caused by the laying in cold weather, and what part is caused by the physical characteristics of the block. I wouldn't care to try to distinguish.

Q. Mr. Rivers, when you went down to examine the floor, did you use an instrument on it, or merely observe the condition of it?

A. On my first visit there were puddles on the floor as deep as three-quarters of an inch. There is no better instrument than that to determine where you have a sag or low spot. [494]

Q. Would you tell, Mr. Rivers, where the water stands three-quarters of an inch deep, please?

(Testimony of Victor C. Rivers.)

A. The deepest spot is right at the end of the washmobile—right at the northwest corner of the washmobile.

Q. You say that's three-quarters of an inch deep?

A. Well, when the water is standing—I didn't measure the depth. I only estimated it.

Q. You only estimated it? A. Yes, sir.

Q. How large is that puddle or pool?

A. About as big as that second table in front of you. There isn't only one pool—there is a number of depressions, and there is another location under the hoist where there is considerable depression—I noticed that as well.

Q. Did you testify that, under your understanding, the grade of this particular floor was established at three-eighths or three-sixteenths of an inch to a foot?

A. I'm not entirely sure in my memory, but it seems to me it was three-sixteenths in the specifications. I could confirm that quickly.

Q. Did you testify that the standard varied from one-eighth to one-quarter of an inch per foot?

A. That is correct. We bring it in one-eighth for a ways, and as it approaches the drain, we like to break it down to a quarter. [495]

Q. How many floor drains are provided for in the specifications, Mr. Rivers?

A. I would have to look on the blueprints. I don't remember. I believe that there is three showing there now.

(Testimony of Victor C. Rivers.)

Q. Do you recall where the original location of the washmobile was, according to the plans?

A. No, I don't, and I don't believe the original location was indicated on the plans.

Q. Do you know whether or not the location of the washmobile was changed at any time?

A. I understand it was, but I, of my own personal knowledge, do not know that it was. I have heard hearsay to that effect.

Q. Do you know whether or not the type of hoist was also changed? A. No, sir, I don't.

Q. Would the bracing underneath the two hoists make any difference in the grade of the floor with respect to drainage?

A. I don't believe the blocks there would affect the proper grading of that floor. It it were properly laid and properly finished to grade, I don't see why it should.

Q. Where are the drains located, Mr. Rivers?

A. There is one drain located close to the south wall about midway of the building. [496]

Q. Is that directly in front of the 12 by 12 door?

A. Not quite—pretty near, but not quite. A little off to the west, then along the west wall, at the car hoist, or near the car hoist, there is another floor drain. And then there is a third one back on this other side. I don't recall exactly where it was, but those were the three that I referred to.

Q. Is there any drain where the present washmobile is situated?

(Testimony of Victor C. Rivers.)

A. Not right under the washmobile.

Q. Where is the closest drain?

A. The one on the south wall I just described.

Q. Is there one on the south wall?

A. Not on the south wall, but away from the south wall and about midway.

Q. If the floor is out of grade, Mr. Rivers, do you know how much?

A. Well, to be in grade, the floor should slope to the drains approximately 3/16th of an inch to the foot. Now, in some cases, the floor slopes away from the drains and causes puddles to lie there. It could easily be three-quarters to half an inch out of level in a number of places.

Q. Mr. Rivers, if you owned that garage, would you go to the expense of spending $5,000.00 to remove those puddles?

A. No, sir, I wouldn't.

Q. In other words, you would continue to use the floor as it [497] is?

A. I wouldn't accept the floor from somebody building it without their replacing the floor to a standard that is acceptable.

Q. Did you testify that you would remove two or three inches of the top surface?

A. Yes, I would take off enough so I could get a good substantial thickness of concrete for refinishing it, and lay a wire mesh—chicken wire mesh. There could be other solutions, but that would be the most economical.

(Testimony of Victor C. Rivers.)

Q. How many yards of concrete would be in that floor as it is laid?

A. I believe the floor is laid at six or seven inches—I am not too sure.

Q. Let's take six inches.

A. How many square yards, or cubic yards?

Q. I don't know.

A. Which did you ask me?

Q. Cubic yards.

A. There is just slightly less than 80 cubic yards in the floor if it is six inches thick.

Q. When you refer to cubic yards, Mr. Rivers, do you refer to the type of yard that Anchorage Sand and Gravel delivers? A. Right.

Q. In other words, they deliver cubic yards?

A. That is correct—cubic yards.

Court: I think we will suspend. You may step down. The trial will be continued until tomorrow morning at 10:00 o'clock and in the meantime, ladies and gentlemen of the jury, you will remember the admonitions of the Court as to your duty and the Court stands adjourned until 10:00 o'clock tomorrow morning.

Whereupon at 4:55 o'clock, p.m., September 30, 1952, the trial of the above entitled cause was continued until 10:00 o'clock, a.m., October 1, 1952.

Be It Further Remembered, That at 10:00 o'clock, a.m., October 1, 1952, the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present

(Testimony of Victor C. Rivers.)

as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: The witness may resume the stand. Counsel may proceed with examination.

Q. Mr. Rivers, I have handed you Plaintiff's Exhibit 3, which is the layout of the foundation and walls, and I will ask you this: If that was the only plan at the time that was available when the first contract was signed in this case, what would be the scope of the contractor's work, based on that plan? [499]

A. If this were the only plan, without any supporting plans?

Q. Yes.

A. Well, I would assume that this front wall foundation, and the moving back of the rear wall, would be the scope of the work under this one sheet. I say that because there are heavy lines shown for apparently new construction. I assume that was the understanding.

Q. Based on that drawing, how deep would the foundation be, including the foundation footing?

A. That would be three feet, plus one foot—four feet to the bottom of the footing in all cases.

Q. Now, under common construction practice, if later work were added to that, would that be extra, in addition to the foundation work required on that plan?

(Testimony of Victor C. Rivers.)

Mr. Bell: I object—that is not proper cross examination. It has not been gone into at all.

Court: Overruled.

Mr. Bell: Exception.

A. If there is any doubt of a firm foundation, the specifications generally say you should go down to a firm foundation.

Q. If, later, a basement were constructed, Mr. Rivers, would that be in addition to the work required under this layout?

A. Yes, that definitely is not shown on this plan, and would be additional to this plan, if this is the only plan.

Q. Mr. Rivers, when a plan like this is dated, is it given [500] the date that it is drawn or the date that it is printed?

A. It is generally given the date that the plan or a tracing is approved—the day it is finished and approved. Sometimes you will find both the date that the drawing has been finished, and also the date as approved by the owner.

Court: Counselor, this matter is entirely new. While I don't want to be too technical, particularly in the case of an expert, I think you will have to consider the witness as your witness.

Mr. Arnell: Mr. Bell went into the foundation yesterday, and he listed certain information. I am laying this as foundation for my cross examination.

Court: What was that? What did Mr. Bell go into yesterday?

Mr. Arnell: The additional cost on the basement,

(Testimony of Victor C. Rivers.)

and he arrived at the total cost of approximately $300.00 for the construction of the basement. I am laying this as foundation to go into the cost of the foundation, which Mr. Rivers has testified would be an extra, if this were the only plan available to the contractor at the time the first contract was let.

Mr. Bell: Your Honor, you will remember all I asked him about was the two walls to the boiler room. I never mentioned any additional work on the basement at all.

Mr. Arnell: Counsel can't limit the scope of examination by asking in regard to two walls. When he brought out the [501] question of the basement he opened up the whole field.

Court: You may continue your examination and, if necessary, the jury will be instructed as to whether it is direct or cross. It really makes very little difference.

Q. Yesterday, Mr. Rivers, I believe Mr. Bell asked you a question about the boiler room and two walls, one of which was 8 feet, and another of which was 10 feet? A. Approximately.

Q. Did you not then testify that the cost of those two walls would be approximately $340.00?

A. I testified that an 8 inch wall would cost $2.30 a square foot of wall, exclusive of excavation and backfill.

Q. Now, Mr. Rivers, would it not also be necessary to extend the depth of the foundation—that is, the outside walls—deep enough to provide addi-

(Testimony of Victor C. Rivers.)

tional concrete or cement walls through the full depth of the basement all around?

A. That is correct.

Q. Did your computation yesterday take that factor into account?

A. No, sir. My computation was merely the cost per square foot of reinforced 8 inch wall.

Q. For the two designated walls?

A. The two we discussed were those 68 square feet and 80 square feet.

Q. How much deeper, Mr. Rivers, would it be necessary to extend [502] the two outside walls?

A. That present foundation wall is three feet deep, exclusive of the footing, and if the boiler room is 8 feet, which it is approximately, it would be necessary to extend the outside wall an additional depth of five feet.

Q. Would that be necessary all around the outside wall?

A. No, that would be necessary only on the west and the south side. That would be the wall across the end of the west wall of the boiler room.

Q. Are you able, Mr. Rivers, to estimate the cost of the excavation which would permit the construction of the type of basement that now exists?

Mr. Bell: Object as improper cross examination.

Court: Overruled. You may answer.

A. The excavation—the yardage wouldn't be great, but to bring in equipment and do it, it would take at least a day's time—and it would probably

(Testimony of Victor C. Rivers.)

cost, with the normal equipment in this town, around $150.00 for that excavation.

Q. Now, are you able to estimate what the probable cost of the backfill would be for the basement?

A. Well, there would be two costs there—the cost of removing the excavated material, and the cost of using what was necessary to backfill around the walls, and I would say that it would probably cost in the neighborhood of $50.00 for that operation. [503]

Q. You mean for the cost of removal, plus backfill?

A. They would spread the excavated material in the general area and then backfill around the walls. That is a rule-of-thumb estimate, however.

Q. When you answered Mr. Bell's questions yesterday, Mr. Rivers, you arrived at approximately $2.30 a square foot of wall space. Did you figure in the cost of plywood forms, including the framing?

A. Fair costs for estimating purposes are generally figured so much per contact foot, and ordinarily when you use plywood forms, you reuse the plywood often. In using shiplap forms, you can use 75 per cent of the shiplap. You figure the cost at 50c a foot per contact foot—two feet for every foot of wall—two on each side, and that is $1.00 for forms in that calculation.

Q. Then the balance of this $2.30 figure was for concrete, I presume, and steel?

A. I calculated two pounds of steel per square

(Testimony of Victor C. Rivers.)

foot, and that was 30c, and the concrete was calculated at approximately $40.00 a yard, and that was $1.00.

Q. Are you able, Mr. Rivers, to estimate the cost of the stairway or stairwell?

A. Which do you mean—stairway or stairwell?

Q. Well, both of them together.

A. Roughly, I could estimate it—yes. [504]

Q. What would you estimate it?

Mr. Bell: Your Honor, object to that on the same grounds. It is not proper cross examination. It never was gone into yesterday.

Mr. Arnell: You went into the boiler room, and that's part of it.

Court: Overruled.

Mr. Bell: Exception.

A. Do you want an estimate of the stairway and the stairs?

Q. Yes.

A. I would say the stairwell—I would say $2.00 a cubic foot for the enclosed area, and it would be 240 cubic feet for the area included in that stairwell. That, at $2.00, would be $480.00 for that particular part.

Q. Would that, Mr. Rivers, include the concrete wall that runs down along the stairway between the boiler room—in other words, where the fire door——

A. That would include the enclosed area. The wall on three sides and the stair down.

Q. Now, what would be the approximate cost, Mr. Rivers, of the additional wall on the west side?

(Testimony of Victor C. Rivers.)

A. Exclusive of your excavation, again that is an 8 inch wall, and it has about the same steel I quoted on the other 8 inch wall, and about 230 square feet of wall space.

Q. In other words, if it were 14½ feet, it would be approximately [505] five feet deeper, would it not? A. Yes.

Mr. Bell: Object to the question. He says 14½ feet and the witness has already testified it was 10½. It is confusing.

Mr. Arnell: That is the inside wall, Mr. Bell.

Court: Overruled. The witness will know whether there has been any misstatement of his testimony. What was it you said in that connection, Mr. Rivers?

Mr. Rivers: I said the boiler room was approximately 8½ by 10 feet—approximately an 8 foot ceiling.

Court: All right, counselor.

Q. What would be the cost of the extra depth of the outside wall, then, Mr. Rivers?

A. 5 by 14 feet——

Mr. Bell: Object to calculating it on 5 by 14. The witness has informed him it was only 8½ by 10 feet.

Court: Overruled.

Mr. Arnell: I will get the plans, your Honor. Maybe that will clarify it.

Q. Mr. Rivers, I have handed you Plaintiff's Exhibit 4F, which is the layout of the basement and the stairway? A. Yes.

(Testimony of Victor C. Rivers.)

Q. Would the answer you have previously given in regard to the stairway and stairwell include a portion of the west [506] wall to the width of the basement or the steps, or would it not?

A. No, it would not include the width of the steps. It would merely include the 10 foot width of the boiler room.

Court: What does the plan show as to the size of the boiler room?

Mr. Rivers: They show the inside dimensions at 10 feet width and 12 feet deep.

Q. Will you state, Mr. Rivers, what the over-all width and breadth of the furnace room, including the stairway, is?

A. Including the stairway, the over-all width inside is 15 feet 8. The over-all depth is 12 feet inside dimensions.

Q. What are the outside dimensions?

A. The outside dimensions on the width are 17 feet, and 13 feet, four inches.

Q. Would it be faster, Mr. Rivers, if you just sat and made a computation of the cost based on those plans, or if I ask you questions?

A. The cost of the boiler room and the stairs?

Q. Yes, and the additional foundation depth on the west and south walls?

A. Well, it would be faster to make a computation of the whole area. I can give you a round figure estimate of the cost.

Q. Without a computation, or with it?

A. No, with the computation. [507]

(Testimony of Victor C. Rivers.)

Mr. Arnell: I think perhaps, your Honor, it might save time and speed this thing up if we could do it that way.

Court: How long would it take to make a computation?

Mr. Rivers: About 10 minutes.

Court: The Court will stand in recess for 10 minutes, and the jury will remember the admonitions of the Court as to duty.

Whereupon the Court at 10:30 o'clock, a.m., recessed until 10:40 o'clock, a.m., at which time the following proceedings were had:

Mr. Bell: Your Honor, before the witness answers the question, I will renew my objection and call your attention to Exhibit BCG 5. In the general building it shows that the stairway was a part of the general contract and no part of the extras, and it has been testified to that all the way through. We are confusing the issue here and it could not do any good because his contract for building that stairs is in the general contract. It is not an extra at all and it was never claimed to be an extra by anybody. They are having Mr. Rivers figure a bunch of things that are confusing to the jury.

Mr. Arnell: I think, your Honor, Mr. Bell's statement is a little false.

Mr. Bell: Well, I can show it to you.

Court: Please don't use the word false.

Mr. Arnell: Excuse me—incorrect, because it says fittings, [508] foundation walls, boiler room walls are in place. When Mr. Bell says——

(Testimony of Victor C. Rivers.)

Court: Wait a minute. I think I shall not go into any further argument at this time. At the end of the trial counsel may bring it up upon request for instructions or otherwise. The objection is overruled. The jury will listen to the evidence and, unless instructed otherwise, will consider it.

Mr. Arnell: If it is any inconveniece to the Court or jury, we could make Mr. Rivers our witness.

Court: I am going to instruct the jury upon that. When counsel for one party, on cross examination, goes beyond the scope of cross examination, then the witness is a witness of the party who goes beyond the scope of cross examination. It is not presumed that the witness tells the truth for one party and not for other parties.

Q. Mr. Rivers, have you arrived at a computation? A. Yes, sir, I have.

Q. Would you state to the jury what your computation includes?

A. Well, for the cost of building the boiler room of the size shown on the plans, less the amount of work already included in the foundation walls. I estimate the boiler room itself, without the stairway, would cost $1,844.00. And I estimate the cost of the balance of work in the stairway—I said originally, it would cost $480.00, but deducting the work that was done already, the balance on the stairwell [509] and the stairs would be $342.00, so for the total work of the boiler room and the stairway, I estimate an amount of $2,186.00 would be an average cost

(Testimony of Victor C. Rivers.)

figure. That would include excavation, backfilling, concrete forms, steel, and all work in those two areas.

Q. That would also include the contractor's profit, would it not?

A. It would include the cost to the owner.

Miss Wise: May I ask a question? What's the difference between stairway and stairwell?

Mr. Rivers: The stairwell is the whole opening and the stairway is the actual stairs. The stairway is actually the steps and the risers. Oftentimes you have to distinguish between the two, because there is different ways at arriving at costs.

Mr. Boward: May I ask the witness whether he calculated the figures on the cost of construction as of today, or two years ago?

Mr. Rivers: I used $2.00 a cubic foot of enclosed space in both the boiler room and the stairwell and stairs.

Court: The question is whether that is the present cost or the cost of a year and a half or two years ago—not what was included—but as to whether it is present cost or cost when it was built.

Mr. Rivers: It would be my estimate at the present time. [510] It might vary as much as 10 or 15 % over what it would cost two years ago.

Court: It would be lower two years ago?

Mr. Rivers: Yes.

Court: Counsel may proceed.

Q. As we recessed yesterday, Mr. Rivers, I asked you a question regarding the cubic feet or

(Testimony of Victor C. Rivers.)

yards, rather, of concrete that would be required in the repair or rehabilitation of the garage?

A. Yes.

Q. Now, did you testify yesterday that it would be your recommendation that two inches of the surface of the present floor be chipped off?

A. Yes, I testified that, in order to bring the floor up to a proper grade and still have a good sound floor, that I would remove the top two to two and one-half inches, and then replace it with wire mesh—reinforced material.

Q. Do you recall how large the show room is, Mr. Rivers?

A. Not without looking at the plan.

Q. You have the other set there. Could you turn to the one that shows the floor layout. Perhaps I could rephrase my question. Mr. Rivers, what is the distance between the front wall of the building and the partition that separates the shop and the whole show room, including the offices?

A. Well, it is approximately 32 feet. It's more than that— [511] just a moment—approximately 32 feet.

Q. Do you recall any provision for drainage in the show room at all? A. No, I don't.

Q. Do the plans show any?

A. This floor plan does not. I better look—it definitely does not show anything in the show room, no It doesn't show anything on the floor plan except—no, this is in the garage part—nothing in the show room.

(Testimony of Victor C. Rivers.)

Q. Would it then be necessary to carry out the rehabilitation in the show room, as you have described, with reference to the floor of the shop?

A. No, a very small part of the show room would have to be rehabilitated—a small strip across the front wall only.

Q. Do you think, in its present condition, that it is serviceable, Mr. Rivers, for the life of the building? A. Yes.

Q. In other words, it would not be absolutely necessary to tear out the concrete in the showroom in order to——

A. No, I don't think it would, except for the part that has been frostbitten across the front. I think that should be smoothed off and leveled off.

Q. When you say smoothed off, do you mean just refinished or removed?

A. You would have to remove it to get a thick enough layer so [512] it wouldn't chip out—enough so it would be part of that slab.

Q. Then, upon the basis of your testimony, it would be your recommendation that the portion back of the partition—that is, the entire shop area—be resurfaced, is that correct? A. Correct.

Q. You testified yesterday it would take $5,000.00 to rehabilitate the whole garage floor?

A. That was my estimate of the entire floor at $1.00 a square foot—for removal and replacement.

Q. That included the 50 by 100 building?

A. That is correct—the whole floor area.

Q. Why would you chisel off, say roughly two

(Testimony of Victor C. Rivers.)

inches, Mr. Rivers, and then lay wire mesh and then resurface?

A. Because, in some places, if you just laid it over the present floor, you would have such a thin layer of new concrete it would scale and chip. You would have to go deep enough so that over the whole floor you would have good material—have enough thickness and body to make it satisfactory —to resist weather and any weight that went on it. This has been used quite a bit and I would recommend not less than two inches be removed and replaced.

Q. Would it not be just as feasible to lay your wire mesh over the entire floor and pour an inch or two over the [513] existing concrete, provided it was cleaned properly?

A. It would have to be cleaned and roughed up so you could get a bond.

Q. Could that be done as easily as the way you recommended?

A. Your bracing, hoist and the drains and other things would have to be adjusted in height. Your hoist would have to be adjusted in height. Anything that was set in the floor would have to be adjusted to the new floor level.

Q. Mr. Rivers, would you say that the existing floor compares favorably with average construction?

A. No, it is sub-standard, in the sense, not of the quality of the material, but of the handling and placing and finishing of the material. I have

(Testimony of Victor C. Rivers.)

said that before—that it is not an acceptable standard of work.

Q. Could the change of location of these various pieces of equipment have any effect on the present location of the floor?

A. It shouldn't have. The floor is a separate item over the equipment, and the floor should be laid properly and to the grade specified within reasonable working limits.

Q. Based upon your testimony this morning, Mr. Rivers, that it would not be necessary to remove all of the show room floor, what would be the result, so far as the price is concerned, if you just repaired, according to your testimony, the rear of the building? [514]

A. I would say that it would lower the price of doing that work approximately $1,500.00. That is the amount of square feet of floor space in the show room.

Q. Mr. Rivers, is this drainage condition that you have testified to, one that is common to the whole floor, or do these pools collect just in certain areas?

A. Well, I observed the pools in certain areas, and I also observed the floor being rough to a condition where I believe you would have to check the whole floor to see whether the whole floor needed taking out. From an observation with the eye, it is rough enough so I believe it should all be resurfaced.

Q. Did you say that you had not checked at all?

(Testimony of Victor C. Rivers.)

A. I checked the areas of work, where there was water standing. I was over the whole floor, but I did not see how deep the depressions were. The parts that were wet at the time did show the depressions there, and the low spots very well, and they were far below where they should have been, as much as three-quarters of an inch, as I have said.

Q. On the date of your last examination, how many pools of water did you observe standing on the floor ?

A. The date of the first examination—it was a wet day and they were working in there and I can state that date better. That was the 19th of August, and I observed pools of water in two work areas on the west wall and on the south wall [515] near the washmobile.

Q. Did you examine the exact pitch of the floor, or the exact grade?

A. No, I did not determine the exact grade of the floor, in fact, the thing that I determined was about the low spots and water lying in the depressions.

Q. Mr. Rivers, is it not common for concrete floors of this type to remain damp even though there is good drainage when water conditions are wet?

A. Not after the sub-grade material, the foundation material, has drained. They don't remain damp unless moisture is brought in on the surface of them.

(Testimony of Victor C. Rivers.)

Q. The point of my question is this, Mr. Rivers. Is it possible to construct a concrete floor that, when water conditions are wet, let's say, will at all times be dry?

A. The floor itself won't always be dry, but a floor, properly constructed, will drain. If the floor does not have a grade, the water collects and then you have a problem.

Q. At the time that you observed these pools that you have testified to, did you inspect the floor to see whether it was clean of dirt and grease and that sort of accumulation?

A. Yes, I did. I checked the general condition of the material and the dirt on the floor at that time.

Q. Was it clean so that the water could drain?

A. Yes, there was some debris on it—driving cars back and forth, [516] in and out—there was some little dirt and debris, but nothing to obstruct the water had there been drainage.

Q. How large was the collection around the washrack, Mr. Rivers?

A. Pretty good size—about as big as this table in front of you.

Q. Would it be possible just to remove that particular section and build it up so it would drain properly?

A. No, from observation, the floor was never laid to proper grade. You have to have it far enough back here so it will drain to the level you want.

Q. If you knew, Mr. Rivers, that the original

(Testimony of Victor C. Rivers.)

boards had been set by instrument, would your testimony be the same?

A. Yes, I wouldn't care how they were set if they were not properly troweled during pouring—you could still have the same result. The net result is what determines how good the work was.

Q. Where was the other main collection of water?

A. Over by the car lift.

Q. You mean the hoist?

A. The hoist, yes.

Q. How large was that pool?

A. Well, there was a number of pools in there. I didn't count the individual pools. I merely observed the condition of the surface. [517]

Q. Just a visual observation, without an instrument, is that correct?

A. That is correct, yes.

Q. Did you testify, Mr. Rivers, that the standard of construction, so far as grade was concerned, was from one-eighth to one-quarter of an inch?

A. That is the grade I prefer to use on a garage floor, and as I recall the specifications, it was 3/16ths inches to the foot.

Q. In laying out a floor like that, Mr. Rivers, do you take into consideration the location of the various types of equipment that are used?

A. Yes.

Q. In other words then, would you design a floor that is used just strictly for mechanical repair work at the same level pitch that you would one

(Testimony of Victor C. Rivers.)

that was designed to drain off water from a wash-mobile?

A. Well, as I say, in a garage floor, I prefer to use—the way you do that, you establish the grade of your drains and from that you grade your floor in. And where you have an area where you want some special piece of equipment to go in, you hold it more level—about an eighth of an inch to a foot. You can use that for a car lift or car hoist.

Q. The point of my question was this, Mr. Rivers. When you lay out a floor, you don't design it so that from one end [518] to the other it slopes a uniform three-eights of an inch, per foot, do you?

A. No.

Q. You break the floor up into sections, according to equipment? A. Right.

Q. Then would change of location of equipment, after the floor is poured, have any effect on the functioning of the floor now?

A. It shouldn't have. The floor would be graded toward your drains. Equipment should not affect the grade of the floor.

Q. I realize that, Mr. Rivers, that it shouldn't affect the grade of the floor, but assuming that the floor was graded for one use, and the equipment was changed and it was devoted to another use, might that not have some effect on the way the floor would drain off?

A. No, I don't believe so.

Q. Yesterday I believe you testified regarding

(Testimony of Victor C. Rivers.)

the windows in the south wall. Did you or did you not say they were loose?

A. I said there was two of them that were actually loose, yes, that is correct—one in the south wall and one in the east wall.

Q. Were you referring to the window itself, or—— [519]

A. The window includes the frame and the window, the whole opening, the frame, casing, the jamb, sash and the panes, and the window itself.

Q. I am referring to the middle window that sets in the concrete block wall?

Court: Are they usually sold as a unit—altogether—the glass and frame and everything?

Mr. Rivers: The sash is sold as a unit, and generally the glass comes separate. The sash is the part that holds the glass.

Q. Is the work that would be required with respect to these windows, Mr. Rivers, just finish work? A. In my opinion, yes.

Q. Such as you described yesterday?

A. Yes.

Mr. Arnell: No further questions.

Court: Any redirect?

Redirect Examination

Q. (By Mr. Bell): Mr. Rivers, I will ask you to take this plat that Mr. Arnell has called your attention to—it is Plaintiff's Exhibit No. 3—and please tell the jury what it should cost normally the owner of the building to put this wall in, across

(Testimony of Victor C. Rivers.)

there to here, being three feet deep—and this wall here, the 12 feet at each end, across the 50 foot [520] space, according to this specification?

Mr. Arnell: I wish to interpose an objection, because there was admitted in evidence a contract calling for the price of $2,542.00. I think this testimony can't be used to alter the contract.

Mr. Bell: You reopened it, and put a lot of stuff in that was provided in that contract. Let him tell us whether it is right or not.

Court: The objection is sustained. There is a contract for $2,542.00 to do that precise work. It's too late now to argue about it.

Mr. Bell: Exception. May I come to the bench, your Honor?

Court: Yes. The jurors will not listen if any counsel do raise their voice.

(Counsel and Reporter approached the bench.)

Mr. Bell: I call your attention that the specifications before you show that the stairway and this other stuff was included in the general contract, and now he has had them all figured to make a figure around close to $2,000.00. Now, then, what was included in the original contract then? I am going to show you that this was included and figured in the original contract because it would only cost a few hundred dollars to do any other work except what Mr. Arnell has shown here, to put the two little walls across and the two little end walls [521] twelve feet long. He got $2,500.00 for about $400.00 worth of work. There is something wrong.

(Testimony of Victor C. Rivers.)

Mr. Arnell: I propose that that is incompetent for the reason that the contract is in evidence. This man is not qualified to testify as to what the terms of that contract were intended to include. The contract before the Court, also the specifications, state that the footings and the foundation in the boiler room were in at the time this contract was signed on September 19th, 1950.

Court: What about the stairway and stairwell?

Mr. Arnell: Our contention is that that was an extra. I have shown Mr. Rivers the exhibit upon which that contention was based—Plaintiff's Exhibit No. 3, I believe it is—and he has testified that any work not shown on that plan would be an extra.

Court: Let me see the original contract. It is Exhibit 1, I believe.

Mr. Arnell: May I make another statement?

Court: Go ahead.

Mr. Arnell: As I recall Mr. Carr's testimony and by the evidence they have offered, at least a portion of the boiler room was an extra.

Mr. Bell: Just the two walls.

Court: He said, I think, that was $250.00, or something like that. [522]

Mr. Bell: That's right, your Honor. That's exactly what the testimony was.

Court: Well, the specifications show, on page SC-1: "Footings and foundation as well as boiler room walls are in place." Is it your contention, Mr.

(Testimony of Victor C. Rivers.)

Arnell, that the stairway is an extra? If so, what is the basis?

Mr. Arnell: It is based, your Honor, on the fact that at the time the contract you have in your hand was signed, there was no plan or design for a basement, boiler room, and stairway.

Court: The stairway would be necessary in any event. Wouldn't a stairway be necessary in any event?

Mr. Arnell: Well, at the time the first contract was signed, Plaintiff's Exhibit 3, which is a layout of the foundation, was the only plan in existence, and to supplement what Mr. Bell said, that contract requires the demolition of the old walls that were in existence.

Mr. Bell: Only one wall to be demolished.

Court: I think the ruling will have to stand.

Mr. Bell: I would like to make another offer then. The defendant offers to prove by this witness, if admitted now at this time, that the only other work done under the first contract, other than that which the witness on the stand has testified to on cross examination by the plaintiff, is the wall in the front three feet deep and 50 feet, approximately, across [523] the front part of which is on an angle, and at the back two 12-foot walls, one on either side, which would only be three feet deep outside of the work that the plaintiff has just shown the cost of by the engineer; and if I cannot show the cost of these walls, it will leave the wrong impression before the jury, as to what the $2,500.00 and

(Testimony of Victor C. Rivers.)

some odd dollars—let me see—$2,542.00 that was contracted for in the original contract was for, because the cost of these walls, if the engineer is permitted to testify to that, has not been covered by cross examination by Mr. Arnell. It would not exceed Five or Six Hundred Dollars at the greatest amount.

Court: The trouble is that the parties agreed by written contract to do certain construction for $2,542.00. That's Plaintiff's Exhibit 1—and after that work had been completed, the other contract was entered into, and in that contract there is a provision that footings and foundation walls and boiler room walls are in place.

Mr. Bell: Exception.

(Counsel and Reporter then left the bench.)

Q. (By Mr. Bell): Mr. Rivers, I call your attention to Plaintiff's Plat, BCG 5, and I will ask you to examine that?

A. Yes, sir.

Q. Mr. Rivers, is that a part of the plans and specifications that you examined in arriving at your figures here? [524] A. Yes.

Q. And is that a part of the second contract, the general contract, as you understand it to be?

A. I can't answer that question exactly. I am not entirely familiar with the contract agreement.

Mr. Bell: I think we can agree that all of these specifications, commencing at No. 2, up through No. 10, that were introduced by the plaintiff, are the plans and specifications upon which the second

(Testimony of Victor C. Rivers.)

contract was made, that is, the general building contract, can we not, Ed?

Mr. Arnell: I can't so stipulate, your Honor, for the reasons we have already stated to the Court. I realize they are the general plans of the entire building, but I can't stipulate that this work that is required by this particular exhibit would be included within the terms of the second contract.

Court: I am going to instruct the jury that the plans and the specifications are a part of the contract, and if this is part of the plans and specifications, they are to be instructed it is part of the contract. If there is something in there that should not have been in there, that was the business of the parties at the time to see that the plans and specifications contained only what belonged.

Q. Now, Mr. Rivers, upon the Court's statement, would you examine No. 5 there, and state whether or not that is the [525] plan for the particular stairway and stairwell—the stair-railing and so on, that were to be built in that boiler room?

Mr. Arnell: Object to the question upon the ground that it is incompetent. This exhibit is only a portion of the contract between the parties, and if Mr. Bell persists in questioning the witness about this plan, I think he should also bring the witness' attention to the provisions of the specifications.

Court: Not necessarily. Counsel will have a right to examine the witness. Overruled.

A. This sheet, No. BCG 5, of the plans is in essential conformity with the building as built.

(Testimony of Victor C. Rivers.)

Q. And now in that BCG 5, do you see the particular drawing of the stairway that was to be built there? A. Yes, I do.

Q. Would you tell the jury what else is in that drawing all the way through?

A. Well, the drawing shows the plan of the stairway and the boiler room—by the plans I mean the projected floor plan—and shows the arrangement of the steel, and shows the size and dimensions, shows the size and dimensions of the stairs, and of the foundations and of the floor slab——

Q. Does it show the floor slab right in the plans there? A. Yes, it does. [526]

Q. Now, Mr. Rivers, as an engineer, if the second contract provided to build the building and everything covered by the plans and specifications, would that include the stairway and the stairwell into the boiler room?

Mr. Arnell: If your Honor please, I wish to interpose an objection on the grounds that the question is incompetent. Although Mr. Rivers is an expert, he can't answer upon the basis of an estimation, or guess, as to what this contract did or did not provide. Therefore I think the question is improper.

Court: He is testifying as an expert upon the plans and specifications. I think the question may be answered. The objection is overruled.

A. Inasmuch as this drawing is a part of the contract documents, and the details and the general information as shown here, I would interpret the

(Testimony of Victor C. Rivers.)

plans to mean that the contractor was obligated to perform this work.

Q. As a part of the contract, Mr. Rivers?

A. As a part of the contract.

Q. Then if he were obligated to perform it as a part of the contract, it would not be a proper extra, would it?

A. Definitely no, unless there was some supplemental or outside agreement to that effect.

Q. Now, I would like to have that plan brought down before the jury so they can see it as this other one has been. May I, your Honor? [527]

Court: Yes.

Q. Now, Mr. Rivers, will you please take the pointer and show the jury the part of the drawing that is of the stairs leading down into the boiler room?

A. This is the southwest corner of the building. This is the stair leading down. This is the bottom of the stairwell and this is the entrance to the boiler room. This is a section cut down there through the middle of the stairs, showing the shape of the stairs and the steel that would go in it, and what type of a footing there is underneath it.

Q. Now, would you please show the jury the drawing showing the slab that has been mentioned as an extra?

A. This is a floor slab of the boiler room—this is the supporting slab which is an extension or part of the first floor.

Q. And are both floors—the extension of the

(Testimony of Victor C. Rivers.)

first floor and the floor of the boiler room—are they both shown in the plans?

A. Yes, the slab of the main floor over the boiler room is shown here, and the slab of the floor on the other is shown here.

Q. Are they a part of the original contract then?

A. They are part of this document, which is included as part of the documents of the original contract. [528]

Miss Wise: Your Honor, Mr. Rivers said the original contract. What did he mean by original?

Mr. Rivers: It is the general contract with which we are dealing. I think you used the term original contract, and I quote you on that.

Miss Wise: Didn't you say part of the original contract?

Mr. Rivers: I did. It has been referred to in various ways since I have been in Court—the general contract, the large contract, the original contract.

Court: There are two contracts in evidence now. An oral contract is just as much of a contract, if proved, as a written one, only if a thing is in writing it is not easy for people to forget it. The first contract for the rebuilding and moving of walls is dated May 24th, 1950—5-25-20, and that is Plaintiff's Exhibit 1, that was read to the jury, I think, when it was admitted. Then the contract that is being referred to now, as I understand it, is the contract for construction of the building, with certain limitations, of course, for $38,450.00; that is,

(Testimony of Victor C. Rivers.)

putting up the building and doing certain work, and this written contract is dated the 19th of September, 1950. Now, the first one, for the moving of the walls and rebuilding the walls subsequently, that is dated, as I said, on May 24, 1950, and the second one, for the construction of the building generally, is dated the 19th of September, 1950. The second one bears the signature of both [529] the plaintiff and the defendant. The first one, the copy we have, is signed by Gothberg Construction Company, by Mr. Gothberg, and the copy we have does not bear the signature of the defendant, but the testimony, as I remember, was that the defendant either signed it or agreed to do so. There is no dispute between the parties that these two contracts were signed and agreed to by each of them. The witness now is talking, as I understand it—the questions have been directed to the second contract, dated——

Mr. Bell: September 19th.

Court: September 19th, and part of it says the contractor shall furnish all of the materials and all of the work shown on the drawings and described in the specifications entitled "Construction of Nash Garage." Those drawings are the drawings on the blackboard there, or part of them at any rate, and the specifications—Mr. Arnell will hold the book up so you can see it. The specifications have not all been read to you because they are voluminous, and no person in the world could remember it all. Certain paragraphs have been read, and you will take them with you when you decide the

(Testimony of Victor C. Rivers.)

case. And counsel, in their arguments, will refer to certain paragraphs, and the Court, in its instructions, will refer to certain parts of the specifications, and you will be instructed by the Court that this contract of September 19th and the plans and specifications all go together. They are all parts of the [530] contract. This Plaintiff's Exhibit 2, as signed by the parties, refers to and adopts the drawings as they are called—they are usually called plans, aren't they, Mr. Rivers?

Mr. Rivers: Plans include the specifications.

Court: They are all part of this contract, and you will be so instructed by the Court. Now, of course, having made a written contract, the parties can modify it by oral agreement, but that is a matter to be debated by and by. Counsel will proceed.

Q. Mr. Rivers, for the purpose of clarifying my statement, that the juror has asked about the contract, I refer to the contract as the original contract. Are you referring to that in answer to my question as the contract of September 19th—the general contract on the job?

A. Yes, the second contract that the Judge just mentioned.

Q. And I will ask the question over to clarify it for the particular juror. Does those plans that you have described there—are they a part of the second contract, or the one of September 19th?

A. They are definitely included in and are a part of the contract of September 19th.

(Testimony of Victor C. Rivers.)

Q. And from an engineering standpoint, if they are included in the plans and specifications then, it would necessarily not be an extra for which the contractor could charge, is that right? [531]

A. It would be an obligation under the contract without being an extra.

Mr. Bell: I see.

Court: Suppose the specifications contain some contradictory clause. Then what would your answer be, or could you make an answer to that?

Mr. Rivers: That would be a matter of arbitration. Ordinarily there is an arbitration clause. I believe you will find one in the specifications. The parties have to get together for consultation. The engineer would determine what was originally intended, and if there were any questions about his decision, it would be a matter of arbitration between the parties. The engineer would make a decision as to intent. There are occasionally conflicts between the contract and specifications, and the engineer interprets them, and if his decision is not accepted, there is arbitration. I believe you will find an arbitration clause at the end of these specifications.

Q. Mr. Rivers, did you notice one of the walls of the boiler room, which would be the south wall of the foundation, as to whether or not it is cracked and has a large curve in it?

A. The south wall of the boiler room, or of the stairwell?

Q. The stairwell. Did you notice a large bulge in that wall?

(Testimony of Victor C. Rivers.)

A. I don't specifically recall that. [532]

Q. Did you examine this water pipe on the outside at the front of the building? A. Yes.

Q. Would you please tell the jury what condition that is in?

A. The water pipe comes out of the wall of the building about three feet above the ground, and enters into the ground about six inches from the building. It is an exposed pipe and would be subject to freezing in the winter. It is not properly installed to be a safe pipe installation.

Q. Did you examine those pipes inside, that are supposed to come down from the top to connect to the exhaust of automobiles when the motors were running. Did you examine those?

Mr. Arnell: If your Honor please, I believe that this is beyond the scope of Mr. Bell's first examination. He went at some length through these items, and I don't recall he asked any questions about this, and I certainly didn't.

Mr. Bell: I didn't ask—I had forgotten.

Court: The fact that it was not put in on direct would not bar it now. I presume it is relevant.

A. Yes, I examined the exhaust pipes. The purpose of these exhaust pipes in the building is to put down through the exhaust of an engine while it is running, and it will then take the fumes up outside of the building, and you can run [533] your engines in the building without getting fumes inside.

Q. What did you find from examination of those pipes?

(Testimony of Victor C. Rivers.)

A. I found them to be—well, I should say, home-made. There was a piece of light solid metal pipe going out through the roof. Then there was a section of flexible pipe approximately 12 feet long, attached to that first pipe, and that sectional pipe was hanging from a counter balance weight on the wall, which kept it off the floor and overhead, so when they wanted to put it on the exhaust of an engine, they could pull it down and push it on the exhaust pipe.

Q. Were they adequate for the purpose or not?

A. I would not consider them adequate for the purpose.

Q. Mr. Rivers, when a garage is closed up tight in the winter months, and a group of mechanics are working in the garage, is there or is there not created carbon monoxide from running the motors in the place? A. That is right.

Q. Are these exhaust pipes, or pipes to carry this exhaust out, necessary in Alaska?

A. I consider them so, and I think if you are going to run engines indoors you must have them for the safety of the workers or the safety of anyone in the building.

Q. Mr. Rivers, you read all the specifications?

A. In detail. [534]

Q. I believe there is a clause in there that provides that if the specifications or ordinances or building codes conflict, that the building code shall prevail, is there not? A. Yes.

Q. Now, Mr. Rivers, what does the building

(Testimony of Victor C. Rivers.)

code require for a depth of a foundation for a building like this?

Mr. Arnell: If your Honor please, we should like to interpose an objection on the ground that the question is incompetent. The Building Codes of the City of Anchorage are the best evidence.

Court: Objection sustained.

Mr. Bell: Well, we will have to get one and bring it in. I just thought we could save time if he knew.

Court: There is a copy in my office, counsel.

Mr. Bell: Of the Building Code?

Court: Yes, it was given to me by the City Attorney about a year ago.

Mr. Bell: Is it about three quarters of an inch thick?

Court: Yes.

Mr. Bell: That is the General Code, I believe. We will have to get the building inspector to get the Building Code.

Court: Oh, I haven't that.

Mr. Bell: I haven't it either.

Q. Mr. Rivers, is there anything in the original specifications, that Mr. Arnell had you examine here, for the building [535] of anything other than one wall approximately 50 feet, or a little at an angle at the front, and then two walls, 12 feet long at the back extension of the main foundation walls, and one wall of 50 feet? Is there anything else in there that shows?

A. Yes, there is a chipping and removal of an

(Testimony of Victor C. Rivers.)

existing front wall. Evidently there is also chipping and removal of what was an existing wall across the rear and, in addition to the walls, there were the wall columns, fittings for the wall columns, and there is the wall foundations. They were all included in that plan.

Q. Does that plan show the depth of the wall?

A. Yes, sir.

Q. What depth does it show?

A. It says three foot of wall and one foot of footing, making an over-all depth of four feet, but it doesn't say what that depth is below. That is the depth from the top of the wall to the footing, but the plan doesn't show any existing ground level.

Q. So you couldn't tell from that how much would have to go into the ground to make the wall that high, because you do not have the ground level shown? A. That is correct.

Q. I see. Now, Mr. Rivers, you were asked about this system of taking off two or three inches of the present floor, and [536] to rebuild it. Now, approximately how long, considering the normal work in Anchorage and the handicaps that you naturally run into, how long would it take, ordinarily for a contractor to go in there and tear that out and resurface it so that it would be firm and true, sufficient to go back in and work?

A. It is pretty hard to answer that. It would depend upon how much equipment he had. Ordinarily, doing this job, a small contractor would have one compressor and probably two jack ham-

(Testimony of Victor C. Rivers.)

mers. Each jack hammer could chip probably 200 feet a day. That would be 400 feet for two men, and two jack hammers and a compressor operator. Now, we have got some 3,500 feet involved, about 8½ days of chipping to get the surface ready for repair, and there would be additional work of laying the concrete. It would probably take two weeks of time to do the work.

Q. Then, Mr. Rivers, how much time would be required to keep the mechanics and equipment off of that floor before it was hard enough to get back on it to work?

A. Well, to actually work—concrete gets the initial set or crystallization in a period of approximately four hours. Then it gets approximately one third of its total strength at the end of seven days, and it gets about 92% of its total strength at the end of 28 days, and a slab of this type could probably be used after about seven days. It [537] could be entered upon and walked on long before that, but to put it to any use would not be advisable. Seven days would be the minimum time.

Q. So the equipment would have to be taken out, and it would take three weeks before it could be used again?

A. Well, that would have to be worked out on a program. You would have to take out a section of the floor at a time and repair it, and then probably move to the next section. It could be worked out so part of the building could be kept in use and

(Testimony of Victor C. Rivers.)

the other part repaired. That would be a matter of sound operating program.

Q. But it would mean the same thing, or loss of space about the same length of time?

A. That is correct.

Q. Now, Mr. Arnell asked you about pouring a three-inch floor over this floor. If that was done it would be higher than the floor in the show room and the office, would it not?

A. That is correct.

Q. Would that ever be feasible from an engineering standpoint?

A. I think it is feasible, but I don't think it would be advisable.

Q. I see. Do you remember in the specifications the reference to the concrete slabs where they were not properly laid. What was to be done?

A. They were to be removed and replaced. [538]

Q. And if they were removed and replaced according to the contract, Mr. Rivers, what would it cost to do that?

A. Well, I believe, actually to remove and replace them, would take in the neighborhood of $1.75 a square foot of floor space—perhaps as much $2.00. Is that a seven or a six inch slab? As I recall, it is six inches.

Q. Six, Mr. Gothberg said.

A. I don't think it could be removed and replaced for at least $1.75 to $2.00 a square foot. It has reinforcing wire mesh in it, and it would be quite a job to remove that slab.

(Testimony of Victor C. Rivers.)

Q. $1.75, and I believe you stated there was approximately 3,500 feet in the garage part?

A. In the part that would need reinforcement, yes, sir.

Q. At $1.75 a foot. Now, Mr. Rivers, in your many years in Alaska, have you been in a large number of garages where there is concrete floors during the snow time? A. Yes.

Q. What happens when a car is run into a garage, where it is warm and it comes in from out on the street?

A. Well, the snow and the ice build up on it and it melts off, and you have quite a substantial amount of water in and around the car in the garage.

Q. Then is it very essential that the drains work properly so the mechanics can get in these cars?

A. I consider in the design of a garage that the drainage of the floor slab is very important. It either affects your work adversely or allows your people to work safely and satisfactorily.

Mr. Bell: You may take the witness.

Court: Counsel for plaintiff may examine.

Recross Examination

Q. (By Mr. Arnell): Did you, Mr. Rivers, in response to one of Mr. Bell's questions, testify that you would interpret the plans that have been initialed by Mr. Gothberg and were admitted in evidence here, to include the boiler room, unless there was some set agreement?

(Testimony of Victor C. Rivers.)

A. That is correct. They are items in the general conditions of the specifications, and this plan is included as one of those parts of the contract documents.

Q. Did you or did you not later testify that the work shown there, with respect to the boiler room, definitely was a part of the contract?

A. In the sense that this plan is included as a part of the contract documents, yes, except if there was some supplemental or other agreement.

Q. Then by that answer you did not mean that the work necessarily was actually part of the $38,000.00 contract price?

A. I do mean just that—that the Plan No. BCG 5 is a part of [540] the contract documents, and the work shown thereon is included in the contract of September 19th, unless there is some supplemental agreement.

Q. Mr. Rivers, I hand you Plaintiff's Exhibit 6 and have turned to page SC-1, which lists the special conditions. I will ask you to read the first item under this schedule.

A. "SC-1. Conditions Existent At the Time Contract Takes Effect: A—Footings and foundations as well as boiler room walls are in place."

Q. What does that mean to you?

A. That means that the amount of work that is covered in this drawing is now withdrawn from the work by reason of this stipulation. It would mean to me that this work had already been accomplished, and that this specification, by being

(Testimony of Victor C. Rivers.)

agreed to in the contract, withdrew that work from the work to be performed.

Q. Then the cost of that work, whatever it might have been, was not included within the price of $38,450.00? A. Under this condition, no.

Q. Mr. Rivers, Mr. Bell asked you regarding some exhaust pipes. I will ask you to turn to Page V-3 and look at Section V-07.

A. Yes, I am familiar with it.

Q. Do you know whether or not, at the time the building was turned over to Mr. Carr, the exhaust system that had been installed complied with this section of the specifications? [541]

A. On direct examination I was not asked that question. I will say that as far as I could tell the exhaust pipes, as specified or as installed, do comply with this specification. I was asked whether they were adequate and I have answered that question. No, they are not adequate.

Q. But they do comply with this particular specification?

A. Essentially, they comply with this specification.

Q. Now, Mr. Rivers, in regard to this concrete floor again——

Court: We will recess until 2:00 o'clock, and ladies and gentlemen, you will remember the admonitions of the Court as to duty. The court will stand recessed until 2:00 o'clock.

Whereupon at 11:55 o'clock, a.m., the trial of the above entitled cause was continued until 2:00 o'clock, p.m.

(Testimony of Victor C. Rivers.)

Be It Further Remembered, That at 2:00 o'clock, p.m., the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: Mr. Rivers may resume the stand, and counsel may proceed with examination.

Mr. Arnell: If Your Honor please, I would like to make Mr. Rivers our witness for one question.

Court: You may do so. He has been your witness as to [542] other questions. It is so mixed up that it's pretty hard to separate.

Direct Examination

Q. (By Mr. Arnell): Mr. Rivers, I will hand you Plaintiff's Exhibit 6 and ask you to read Section SC-1, C, under Special Conditions.

A. "Special Conditions. SC-1, C: Structural steel is on site, but is not in place and consists of blank pounds."

Q. By that provision, Mr. Rivers, would it be incumbent upon the owner, or Mr. Carr, to furnish all the structural steel for the building?

A. Well, it doesn't say. It says structural steel is on site and I assume that they might have some special stipulation in regard to any other part of it. I wouldn't know.

(Testimony of Victor C. Rivers.)

Q. Ordinarily, would this constitute an explanation that the contractor would be required to furnish this steel?

A. Well, it doesn't say the number of pounds here. It says structural steel is on site, and it doesn't say all of the steel, and it doesn't show the number of pounds. It is an omission that should have been corrected. Evidently it was not, but I don't see how the owner could be bound for all the structural steel under this clause. It could mean zero pounds and it could mean ten, and it could mean ten tons or more.

Q. Mr. Rivers, if you were estimating a job with that type of [543] special condition before you, would you include in your cost any items for structural steel, or would you exclude them?

A. If I were estimating a job, I would want to know what steel was in the job, and would add anything that wasn't there, but it is a hard question to answer as to what was actually on the site. It should have been determined as to if it was adequate. This clause means nothing in view of the fact that they have filled in no weight of the steel there. It just says "structural steel is on site but is not in place and consists of blank pounds."

Mr. Arnell: No further questions.

Redirect Examination

Q. (By Mr. Bell): Now, Mr. Rivers, Mr. Arnell had you read scope of work clauses before noon, and I wish you would read that same clause again. I want to ask you about it.

(Testimony of Victor C. Rivers.)

A. Was that in regard to footings and foundation of boiler room?

Q. Yes, sir.

A. It is Special Conditions, SC-1, sub-section A: "Footings and foundations as well as boiler room walls are in place."

Q. Now, Mr. Rivers, does that say anything anywheres about the floors in the boiler room being in place, or does it say anything about the stairwell or the stairway being in [544] place?

A. No.

Q. Then, all of this matter that you explained to the jury and pointed out this morning, then, on this map would not be affected in any way, except the walls of the boiler room, would it?

A. That is the way I would have to interpret it if I were interpreting it—that the walls were said to be in place, but it doesn't include the floor slab, and it doesn't include the stairway or the stairwell.

Q. Or the stair railing wouldn't be included either, would it?

A. No, we have to take this literally, and it says "Footings and foundation as well as boiler room walls are in place."

Q. Then the testimony that these matters here, that you explained to the jury this morning, should not be extras because they are covered by the contract of September 19th—then your testimony, as I understand it, was as to everything except the walls?

(Testimony of Victor C. Rivers.)

A. Except the footings and foundation, as well as boiler room walls.

Q. Yes, sir. And all that you explained to them before noon was the stairways, the different angles of the stair, the slab floor and the slab floor above the boiler room—all of them, as I understand now, is actually in the contract of September 19th? [545]

A. They are not specifically excluded from the contract by this clause and, as far as I know, this is the only stipulation in regard to that. Unless there is some other stipulation, they are definitely included in the contract in my opinion.

Q. And as I understand, they would still not necessarily be an extra?

A. They are included in the contract in my opinion.

Q. Yes. Now, these figures you gave Mr. Arnell this morning, of the stairway and the floors and everything, would not be termed an extra at all—should not be termed an extra at all—nothing except the walls?

A. I included the walls in my figure of costs. That is the walls from the footings down—five feet of the walls. I included that in my cost estimate this morning.

Q. Mr. Rivers, what is necessary in a foundation wall in that vicinity? How deep does it have to go to make it safe?

A. Well, in buildings of this kind, we generally remove all the loam on top of the gravel and try to penetrate to the gravel. We try to get below the

(Testimony of Victor C. Rivers.)

level of frost, and frost penetrates deeper than three or four feet, while most of the heat occurs in the top three or four feet, so a building of this kind, if the top material, which is loam and mucky material is removed and you go down three or four feet to gravel, you are generally down to an accepted depth [546] for a building of this kind.

Q. If the side walls for this building were put down to six feet and the footing below that, and then if they cut it off and made the footings and wall only down three feet of wall and one foot of footing, would that have a tendency to cause cracks in the building at the corners, where one side of the foundation was down seven feet and the other part would be four feet, including the footings?

A. No, sir. The bearing value of the steel we use on that type is 5,000 pounds value to the square foot, and that is a working load and the amount of weight on this wall is well under that.

Q. Mr. Rivers, if the specifications do call for it, and I believe they do—you have it, I believe—I wish you would read paragraph D of Section IV, under masonry, and explain that to me.

A. Under masonry: "Concrete Block—Section D—Placing steel: One 5/16ths inch round bar shall be placed in each space of the wall between every third course. 3/8ths inch column ties shall be placed between the same courses as shown on the drawings. The 5/16ths inch bars shall have at least one-half inch, but not more than three-quarters inch cover on the wall face side. All laps shall be forty-bar

(Testimony of Victor C. Rivers.)

diameters minimum. Bars shall be fully imbedded."

Q. Would you explain that to the jury—what effect that has in [547] building a wall—an effect on the wall after it is built?

A. Well, what he is calling for here is a temperature reinforcement in every third horizontal course of the block mortar. He has called for 5/16ths inch round bar. Ordinarily, the purpose of the rod is to reinforce the steel and it is not a primary type of reinforcement. It is a secondary or temperature reinforcement, and due to contraction or expansion caused by temperature, it should hold the wall together and keep it together.

Q. Mr. Rivers, if this wall had had that rod in it, and I believe it is conceded it has not been in, it——

Mr. Arnell: We made no concession.

Q. Anyway, Mr. Rivers, if the evidence shows conclusively there was no such rod put in the wall when it was laid up, would that have any effect on the cracks in the wall?

A. I believe, under normal block construction, it would have a very important effect in helping to keep down the cracks. As I stated yesterday, we are not familiar with the contraction and expansion of these pumice blocks. There is not enough information available, but this building is only 100 feet long, and if those webbing or rods were all in there every third course, it should have a very beneficial effect in keeping cracks down and probably should keep any cracks from occurring, but I can't say

(Testimony of Victor C. Rivers.)

that on pumice block as accurately as I could on concrete or cinder [548] blocks.

Q. Now, Mr. Rivers, I hand you again this report that you have caused to be made, sealed and signed, and will ask you to state if that report is approximately the true and correct findings of your examination of this building?

A. Yes, it is, and I have so certified and signed it in the front title page, or the certification.

Q. And you have testified to the greater portion of all of the detailed facts that are in that report, have you not?

A. Yes, sir, that is correct.

Mr. Bell: We now offer the report in evidence, just for the general reasons and especially the reason that it will be convenient for the jury in verifying any dates as to what Mr. Rivers might have said.

Mr. Arnell: If your Honor please, we wish to interpose an objection. Mr. Bell stated that Mr. Rivers had already testified to what is in there. I think it is merely cumulative and it is immaterial because of that. I think further that it is incompetent also.

Court: The objection is sustained.

Mr. Bell: Exception. That is all, your Honor.

Recross Examination

Q. (By Mr. Arnell): Mr. Rivers, did I understand you, in response to Mr. Bell's question regarding the basement in the plans which are [549]

(Testimony of Victor C. Rivers.)

named, did I understand you to say that all this basement work would be included in the $38,000.00 contract?

A. The only thing that is specifically excluded would be the walls and footings, as stated in this exception or in this stipulation.

Q. Mr. Rivers, I will ask you, do you know what the condition or stage of construction the boiler room was in at the time the contract was signed on September 19th, 1950?

A. No, I had no knowledge of that.

Q. If it were to develop that all of that work had been done at the time that the contract was signed, would you regard any portion of the boiler room as being within the terms of the contract?

A. You say if all of that work had been done prior to the signing of the contract?

Q. Yes.

Mr. Bell: Object to that question because it is diametrically opposed to the evidence. It's a hypothetical question. It does not embrace the evidence produced, and it contains contrary statements that are not in evidence.

Court: Overruled.

Mr. Bell: Exception.

Q. Let me phrase it another way, Mr. Rivers. Is your answer to Mr. Bell based on the premise that none of that work was done at the time the contract was signed? [550]

Mr. Bell: Object. Now it becomes more complicated and confusing because of the previous question.

(Testimony of Victor C. Rivers.)

Court: Overruled.

A. It was my assumption that, on entering the contract, none of the work had been previously performed except that part that was stated here. If it was already performed, there would be no reason for having it in the contract.

Mr. Arnell: That is all.

Mr. Kurtz: Mr. Rivers, I understood you to testify that the area of the floor, the entire floor, would be about 5,000 square feet?

Mr. Rivers: Of the entire building, yes, sir.

Mr. Kurtz: And excluding the area of the show room, which I believe you stated represented about 1,500 square feet?

Mr. Rivers: Approximately, yes, sir.

Mr. Kurtz: That would leave 3,500 square feet, I believe, and you then stated it would cost about $1.00 a square foot to have that repaired?

Mr. Rivers: To have it torn down about two inches and brought to proper grade, yes.

Mr. Kurtz: About $1.00 a square foot?

Mr. Rivers: I believe that was my estimate.

Mr. Kurtz: I believe later on there was some further testimony on it and that is what I am not clear on. I believe you estimated $1.75 or $2.00 a square foot—I am not quite [551] clear——

Mr. Rivers: That would be for taking out the whole slab and replacing it. My first statement was for chipping off two or two and one-half inches, approximately $1.00 a foot, but to replace the whole slab, which is what the general clause in the speci-

(Testimony of Victor C. Rivers.)

fications indicate the owner could have done, it would cost between $1.75 and $2.00 a square foot.

Mr. Kurtz: Taking out the entire slab—would that mean removing all the concrete?

Mr. Rivers: Yes, all six inches. It is a six-inch slab.

Mrs. Curtiss: They keep referring to these water puddles on the floor caused by the rains. Now, I would like to know how the rain gets in there. Does it come under the doors or——

Mr. Rivers: Well, no. That is caused by cars coming in wet and the rain off the cars, and also by being washed by water that is used in the building or brought in on a car. For instance, a car that has snow and ice on it will fall and put quite a few gallons of water on the floor. The floor has quite a few depressions and low spots and will not drain.

Mrs. Curtiss: I understood the snow part, but I couldn't understand the reference to rain.

Mr. Rivers: When a car comes in out of the rain it will drip off, especially when it has mud under the fenders.

Mr. Boward: Mr. Rivers, do you interpret the plans and the specifications to include the partition between the show [552] room and the shop, and the doors between the show room and the shop as part of the prime contract of September 19th?

Mr. Rivers: Yes, I do. Now, the plans that are in evidence show a wall section that appears to be a concrete block wall. There are some pencil lines on that, evidently made at a later date, which show

(Testimony of Victor C. Rivers.)

a longer wall, which I assume to be a block wall; but that fire wall partition between the show room and the garage and the doors in it—it is my understanding that the three-paneled door in it was part of this contracted of September 19th.

Mr. Boward: The windows in the show room, that according to your testimony are not a good fit, would that be because the openings for the windows are not plumb, or what would create that occurrence?

Mr. Rivers: I checked the size of the glass and the size of the glass was practically identical for all of the three main windows. The openings are not square and true. That results, of course, in the glass being a poor fit.

Miss Wise: About how many cars can get into this garage?

Mr. Rivers: You mean for storage purposes, or for working?

Miss Wise: Whatever they use it for.

Mr. Rivers: Ordinarily a car can fit in a space of 10 by 24 feet, and you can still walk around it. We have 3,500 square feet and you still have to have access—a way in and [553] out—probably for working purposes, not more than 12 or 14 cars at the most. For storage purposes it would be maybe two or three more.

Miss Wise: Does that include the room that these hoists take up? Aren't the two hoists taking up room on the floor?

Mr. Rivers: Yes, they do, but ordinarily they

(Testimony of Victor C. Rivers.)

have a car right there. They are using it to lift and they work right there—right over the hoist.

Mr. Arnell: Your Honor, may I ask one question?

Recross Examination

Q. (By Mr. Arnell): Mr. Boward asked you the extent of the finish work on the interior portion of the building, Mr. Rivers, and made reference to the door in the fire partition, or whatever you wish to call it. I will ask you to turn to page SW-1 on the specifications and read the last sentence of the first paragraph.

A. "This work shall include a concrete apron by the gas pumps but shall not include the wall board or finish carpentry on any interior partitions, with the exception of the shower room and one restroom."

Q. Would that include the double door, or would it not?

A. The double door, including the hardware, is specified further in the specifications. I do not believe this would exclude it. [554]

Q. Wouldn't the hanging of the doors be included within the finish carpentry?

A. Well, it is a question that's subject to debate. I believe that the hardware list and the finish carpentry statements covers it in such a way that this could not be misunderstood.

Q. In arriving at your conclusion, Mr. Rivers, did you talk to the original architect, the engineer who worked up these specifications and plans?

(Testimony of Victor C. Rivers.)

A. No, sir, I did not.

Q. Then, at this time, you do not know precisely what the intent was?

A. No, I definitely do not.

Mr. Arnell: That is all.

Court: That is all.

Mr. Bell: That is all.

Court: Another witness may be called.

Mr. Bell: We have a witness on his way. He is coming in a taxi and it shouldn't be a couple of minutes until he will be here.

Court: We may as well stand at recess until the witness comes.

Whereupon, the court at 2:32 o'clock, p.m., recessed until 2:40 o'clock, p.m., at which time the following proceedings were had: [555]

Court: Without objection, the record will show all members of the jury present. The next witness may be called.

Whereupon,

ROY FARRAR

was called as a witness on behalf of the defendant, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bell): State your name, please?

A. Roy Farrar.

Q. What is your occupation, Mr. Farrar?

A. I am a mechanic.

Q. How long have you been an automobile mechanic?

(Testimony of Roy Farrar.)

A. Oh, approximately four to five years—four and one-half, I would say.

Q. Did you formerly work for Mr. Carr at the time he was operating the Nash Garage?

A. Yes, I did.

Q. And are you still working at the same place for the new operators?

A. Yes, I am.

Q. Mr. Farrar, how many men usually worked for Mr. Carr, and approximately how many for the present owner, as an average, in the shop?

A. Oh, I would say between five and seven, on an average.

Q. And were they all working on day shift, or did some work [556] a day shift and some the night shift?

A. No, they all worked the same shift.

Q. Are you familiar with the conditions of the floor in that garage during the time that you worked there for Mr. Carr, and during the time that you have worked for your last employers?

A. Yes, I think so.

Q. Would you just tell the jury, in your own words, what condition the floor is in?

A. Well, it is rough and it is uneven. It is cracks in there. You can't get the creeper wheels over. Water will stand a half to an inch deep in spots, and whenever the water stands there, you have to sweep it down the drain with a broom. It won't run down itself.

Q. About how times a day would you have to

(Testimony of Roy Farrar.)

sweep this water down the drain, if it was snowy weather?

A. One to two to three times for every car you put in.

Q. Approximately how many cars would be put in there during the normal day?

A. That's hard to tell. I would say, on an average, anywhere from 10 to 20.

Q. And you would have to sweep the water into the drains two to three times for each car?

A. Well, it would depend how much time they have been in there. The longer they were there the more water. [557]

Q. In the winter time, when cars come in, are they coated pretty well with snow and ice?

A. Yes, especially pickups. They can't even turn their wheels.

Q. When they come in in this warm room, how long does it take to melt the ice?

A. If you don't use steam, three to four hours.

Q. Do you have an instrument known as a steamer? A. Yes.

Q. And you use that on cars you are going to work on? A. Most of the time, yes.

Q. Mr. Farrar, tell the jury what you do to get under the car to work?

A. We have a four-wheel creeper, we call it, and it sets up about an inch and a half above the floor, and we have to lay on that and scoot around underneath, and it has four wheels on casters and they turn in the direction you want them to.

(Testimony of Roy Farrar.)

Q. I believe you stated a few moments ago that there were places in there you couldn't get the creepers' wheels over it. Would you explain what prevents the creeper wheels from going over those places?

A. There is some places an inch and a half—the counter is sunk and you can't get the wheels over there. You have to get up and raise it over. [558]

Q. When the water is in under the cars and you get the creeper in that condition, what do you have to do?

A. You have to pull it up the best you can or slide it over and lift the thing over every one. It sticks right there.

Q. Now, did you or any of the other men have any trouble last winter by getting wet there?

A. Yes, all of us had colds. I don't know whether it was due to that or not, but we worked there and got wet, and then we would go outside where it was cold, and I suppose it did have something to do with it. It was cold outside and then you were damp from the inside.

Q. Can you remember any incident in which your clothing became wet and later, working outside, your clothes were frozen?

A. Oh, yes, about every day. You were wet on your coverall legs where they dragged through the water.

Q. As I understand, in moving this creeper around, you would get your clothes wet where it hung down below the creeper, is that right?

(Testimony of Roy Farrar.)

A. Yes, because you just use your heels. You move your feet and your coverall legs would drag in the water.

Q. And any portion of you that hung out over the creeper—would that get wet?

A. Yes, your arms and legs mostly.

Q. Have you worked in other garages than this one? [559]

A. Yes, quite a few.

Q. Did you ever work in one that was similar to this in any way?

A. No, most of them had good drainage to the back of the car all the time where we didn't have to do that.

Mr. Bell: You may take the witness.

Court: Counsel for plaintiff may examine.

Cross Examination

Q. (By Mr. Arnell): Do you mean to inform the jury, Mr. Farrar, that there is anywhere from no water to half or three-quarters inches all over the floor—the entire floor?

A. Yes, that would be right, yes.

Q. You mean there are no spots at all that slope?

A. Well, there is none that slopes towards the drain, no. I would say the drains seem to be the high spots in the floor.

Q. Is that your personal opinion?

A. No, I seen it because your drain is here, and it will sit to an inch deep, depending on the cars

(Testimony of Roy Farrar.)

coming in there. That is the worst one. The rest are half an inch to a quarter of an inch.

Q. Wouldn't you have to sweep the floor in the winter time when the ice and snow melted anyway, Mr. Farrar?

A. No, not water itself you don't. Ordinarily it will drain [560] enough so it isn't deep enough, but if it is standing there you have to sweep it off or else get wet, either one.

Mr. Arnell: No further questions.

Redirect Examination

Q. (By Mr. Bell): One more question. Do you know whether or not mechanics quit work there during the time you had been working there, due to the condition of this floor?

Mr. Arnell: If your Honor please, I think that question is objectionable on the grounds that it calls for hearsay evidence.

Court: You may answer if you know, of your own knowledge.

A. I don't know for sure, no. I know that a few quit there during the winter time, but I don't know what for, but there has been more quit in the winter than now, but most of them don't say, when they do quit, what the reason is. I know the turnover is more in the winter than it is in the summer.

Mr. Bell: That is all.

Court: Another witness may be called. This witness, without objection, will be excused from further attendance.

Mr. Bell: No objection on our part.

Court: You may leave if you wish, Mr. Farrar, or you may remain if you wish.

Mr. Bell: We rest. [561]

Mr. Arnell: If your Honor please, just for the record, I would like to present a motion for a dismissal of the cross complaint for the reason that the evidence is not sufficient to establish the allegations of the cross complaint. Have you filed an amended complaint?

Mr. Bell: No.

Court: If argument is to be had, I will excuse the jury.

Mr. Arnell: I submit without argument at this time, your Honor.

Court: Very well, the motion is denied.

Mr. Arnell: Call Mr. Taylor.

Mr. Bell: Your Honor, while you are waiting at this time for Mr. Taylor to come up, I understood you permitted him to file an amended complaint without prejudicing my rights in the matter, and it would be denied without answer, is that right? It was never served on me until the second or third day of the trial and I would have a number of days, of course, to answer it, and if there is any technical advantage trying to be taken of it, why then I will ask permission to answer it; otherwise I thought it would stand denied without answering.

Court: I am going to break the ordinary rule at this time on account of the circumstances, and send the pleadings to the jury, so it might be to the

advantage of the defendants to deny, if the defendant wishes to deny, the amended complaint.

Mr. Bell: I will do that. [562]

Mr. Arnell: I might state for the record that I didn't intend to base my motion on the fact that Mr. Bell had not filed it.

Mr. Bell: I will file that, your Honor.

Court: I was sure that counsel was not trying to take any advantage of the pleading, but since the pleadings are going to the jury, which is not the usual custom, it may be—if counsel wishes, he may file an answer to the amended complaint.

Mr. Bell: All right. I would like to do it, otherwise the original answer will go to the jury if the defendants answer.

Mr. Arnell: Call Mr. Taylor.

Court: Mr. Taylor may be sworn.

Whereupon

MAYNARD TAYLOR

was called as a witness on behalf of the plaintiff, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Arnell): Would you state your full name, Mr. Taylor?

A. Maynard L. Taylor, Jr.

Q. What is your profession?

A. An architect.

Q. How long have you been so practicing?

A. In private practice, since 1946, in Anchorage.

Q. Do you have your own firm here?

(Testimony of Maynard Taylor.)

A. Yes, Taylor and Kilpatrick.

Q. Are you familiar with the garage known as the Nash Sales and Service Garage?

A. I made a physical inspection of the garage last week, without knowledge of the complaints involved in this trial, and without having advantage of an examination of either the specifications or the drawings. However, I did make a physical inspection of the building.

Q. Did you also examine and inspect the concrete floor? A. I did.

Q. That was just a physical inspection, was it not? A. Yes.

Q. In other words, you didn't use any instrument on it? A. Nothing.

Q. As to the texture of the concrete, Mr. Taylor, what did its appearance indicate to you?

A. Throughout the entire building, or in the repair area?

Q. In the repair area?

A. In the repair area the monolithic finish appeared reasonably normal. At the time I made the physical inspection, evidently one of the questions arose as to the drains. There were two areas at the time I made the inspection that had some standing water on those areas.

Q. Did you measure the depth of the standing water? [564] A. I did not measure it, no.

Q. Did you observe any condition which would indicate to you that the entire floor in that area had to be removed?

(Testimony of Maynard Taylor.)

A. No, I saw no physical evidence of any reason why the entire area should be removed. There were two areas, as I mentioned, that did have standing water.

Q. Would you point them out to the jury in the location of the building, please?

A. The most objectionable, or the greatest depth of water, probably was the area immediately in front of the rear door.

Q. Is that the location of the washmobile?

A. I am sorry, I am not sure.

Q. Was there a rail on the floor, or do you recall? Were there two rails on the floor?

A. For the lift?

Q. No, on which the washmobile mechanism travels? A. Yes.

Q. Where was the other place where you might say there was a vast accumulation of water?

A. It was on the west side of the building?

Q. In the rear of the hoist?

A. In the vicinity of the hoist, yes.

Q. Did you make any actual measurement of the depth of water in there in this place? [565]

A. I made no actual measurement. It appeared from observation, in walking through the area, that it was approximately one-half inch and the other probably less than a quarter of an inch—probably an eighth of an inch.

Q. Are there only two drains in the building, or do you know?

A. I couldn't say for sure. There were men

(Testimony of Maynard Taylor.)

working and I had no benefit of plans so that I could check specifically where the drains had been placed. It is possible there were drains that I didn't see or couldn't see.

Q. Do you recall how many individual slabs there are that go into making up the floor in that area?

A. It would be an estimate. I kept no figures because at the time I actually didn't know what was involved in this particular suit, so I made a general inspection of the entire building, probably about many things that are not involved.

Q. Were there any cracks in the individual slabs which you observed?

A. Not excessive cracks, however, there were expansion joints.

Q. Those are a different thing, though, from a crack in the slab itself? A. Yes.

Q. Mr. Taylor, I hand you the specifications concerning this particular building, and have turned to Section II, page 4, and ask you read the top line. [566]

A. Do you want this read aloud, or to myself?

Q. Perhaps, for the benefit of the jury, you had better read it aloud.

A. "Remove and replace, when directed by the engineer, topping which is loose or surfaces showing excessive shrinkage cracks. Remove and replace slabs which do not drain properly."

Q. Mr. Taylor, as an engineer who has had experience here, what would be your recommendation

(Testimony of Maynard Taylor.)

with respect to repairing the area around the wash-mobile, if such was necessary?

A. My recommendation would be that a topping be used, meaning a layer added to an area, rather than the removal of the area.

Q. Based on the observation that you made, Mr. Taylor, are you able to state to the jury approximately how many square feet of that area should be fixed up, if it is the contractor's obligation?

A. Mine would be entirely an estimate in that particular area that is in question. It appeared like it was an area approximately 100 square feet would take care of that particular area; however, if I were asked to specify a method by which the entire area could be taken care of, I would first wish to go in and personally place water over the entire area. The two areas that I saw at the time I was there might not be indicative of the necessary depth [567] you might have to go in those two areas. So my recommendation would be a topping, but I couldn't say now what depth.

Q. Do you mean you would have to chisel off part of the existing concrete or lay something over it?

A. There are products you could place over it, again depending on the depth. If the depth is insufficient for the particular product, then you would have to chisel—remove part of the existing concrete.

Q. Would you have to remove two or three inches of it, or just chisel the surface?

(Testimony of Maynard Taylor.)

A. It woudn't involve two or three inches, no.

Q. Would a half inch be enough in order to produce adherence of the two concretes?

A. I would say three quarters of an inch for the various products. If it was straight concrete, you would probably want to go to a depth of at least an inch and a half.

Q. Will you name these products?

A. Magnacite is probably the general term.

Q. If you were an architect on the job, confronted with a situation like this, what would you recommend for restoring or improving the condition around the washmobile?

A. Our office, when confronted with these questions—usually it involves considerable earlier time of negotiation than this time is. Normally, we would direct the contractor, whose responsibility it was, to submit to us a proposal [568] for the correction; and various contractors, having different purchasing power, might come forth with a different proposition. However, at that time, we would probably have to investiagte who, at the moment, was installing these various products, but it would probably be one of the magnacite type.

Q. Assuming magnacite were used to correct the condition you observed down there, can you give the jury an estimate, per square foot, of what it would cost to build up the floor in the two places you have referred to?

A. We have had prices in the office, depending on areas involved. There is a charge based on mov-

(Testimony of Maynard Taylor.)

ing into an area. We have had prices in the office varying from 50c a square foot to probably a little in excess of a dollar. The two areas, assuming my estimate is correct, of $1.00 a square foot per each, which would be $2.00 a square foot—it would involve a price of 50c to a dollar per square foot.

Q. In your opinion, Mr. Taylor, do you think that would be a reasonable way to correct the excessive accumulation of water, based upon the present knowledge you have?

A. I think so at this time, yes.

Mr. Arnell: No further questions.

Court: Counsel for defendant may examine.

Cross Examination [569]

Q. (By Mr. Bell): Mr. Taylor, what is the difference between a structural engineer or a registered engineer, and an architect?

A. Registered structural engineer?

Q. No, a registered engineer in Alaska here.

A. A registered engineer in Alaska may be a civil, mechanical, electrical, structural, and in all, comes under the same license. A registered architect is a man qualified for the design of space or building.

Q. And I believe you stated you were an architect? A. Yes.

Q. Do you know Mr. Rivers? A. Yes.

Q. Do you know whether or not he is a registered engineer?

A. Yes, he has License No. 1, I believe, or 2.

(Testimony of Maynard Taylor.)

Q. I see. Mr. Taylor, I believe you stated you went there some day last week, was it?

A. I believe it was on Thursday. Thursday, at about 11:00 o'clock, I believe was the time.

Q. 11:00 a.m.? A. Yes.

Q. Was it raining at that time?

A. It was not raining.

Q. Was it a nice, clear day?

A. It was at 11:00 o'clock, yes.

Q. And the only water holes you found were not over one-half [570] inch deep, are you sure of that, Mr. Taylor?

A. Without measuring, I am as sure as I can be, by visual inspection.

Q. How many of those holes, carrying water, did you see?

A. I saw two at the time.

Q. I believe you stated $1.00 a square foot would fix one of them, and $1.00 a square foot of concrete would fix the other?

A. Those are approximate figures, based on physical observation at that time, yes.

Q. How many drains did you see there?

A. I was primarily interested in the most objectionable spots, which was that area directly in front of the door, and that is the one that I was primarily concerned with as being the most objectionable.

Q. Who told you that was the most objectionable spot? A. The water on the floor.

(Testimony of Maynard Taylor.)

Q. Did anybody tell you that, other than just the water standing on the floor?

A. No, that was physical observation.

Q. Mr. Taylor, when there is snow on the ground, and when it is raining, cars coming into the garage usually bring considerable snow and water in, don't they?

A. That is correct.

Q. Of course, this being a clear, nice day when you were there, [571] you didn't have that to help you in making an examination? A. No.

Q. Do you know how thick that floor is?

A. No, I do not.

Q. Did you put any instrument on it at all to test the drainage or slope in that floor?

A. No, I did not.

Q. Do you know whether it has any slope in it or not? A. No, I don't.

Q. Mr. Taylor, if you were an architect on a job, and was in charge of handling the work, and the specifications provided that the floor should have a drain of 3/16ths of an inch to the foot and that it should properly drain, and the men would put in such a floor as they put in down there, leaving it in the condition that it is down there, now, would you accept that kind of a job? Would you accept and approve it? A. No.

Q. If it provides that if it is defective—that it would be torn out and put in again—would you allow them to patch it up with a little magnacite, or would you require them to put in a decent floor?

(Testimony of Maynard Taylor.)

A. There are circumstances. I mean, there is so many factors involved. To speak in generalities, the answer would be no, but there are many factors involved. You see, in our [572] contract documents, there is intent and interpretation. That is why I say, specifically, the answer as the question was put, is no. However, there are other factors.

Q. Well, then, if you would not approve it, what would you require him to do then to fix it? Now, if you were an architect in charge of the work and representing the man who was putting up the money to build the building, what would you then require the contractor to do before you would accept it?

A. He would correct it to my specification and the owner's specification. The reason I qualify that is for this reason: There are occasions when something is not correct; however, to the owner it is of small importance, and he often will take a payment in lieu of correction.

Q. Now, if you were an architect, and Mr. Carr was the owner and financing it, and he specifically refused to accept it in its condition and explained himself to you and to the contractor, why he would not accept it, then what would you do?

A. It would be corrected.

Q. And what would it take to correct it?

A. There is one question I have and it is relative to this. There are expansion joints in the slab and I do not know whether or not there are drains provided in each area that is supported by expan-

(Testimony of Maynard Taylor.)

sion joints. In other words, if it is [573] impossible to comply with the specifications, you can write them so it is impossible. And if it is impossible, then a certain amount of leeway has to be given. Now, all factors being equal, if the drainage is possible and it can be done, then I would require that it be done. If the specifications and the plans are such that it cannot be done, of course, certain leeway would have to be given. In this particular case, it depends on how the building was accepted. It is being occupied and judging upon the basis it is being occupied, I would probably recommend that a topping be put on to keep it in occupancy so the owner would be able to use it. If it was not occupied and had never been accepted, I would require considerable more work to be done.

Q. Would you require them to break it out, and a decent job put in—one you would approve?

A. I think I would personally approve monolithic concrete or cement topping.

Q. Now, how thick a topping would you put on that?

A. Normally we have specified, where we don't use a monolithic pour—where we use a topping—we have specified all the way from an inch to an inch and a half, depending on the occupancy. Assuming that the slab was below four inches, I would probably say one inch topping.

Q. And if it was a six inch slab, what would you say? [574]

A. If it is a six inch slab, and the topping were

(Testimony of Maynard Taylor.)

placed at the time the other concrete was, I would say one inch would be fine.

Q. You have seen the garage and you know that was not done? A. No.

Q. Now then, Mr. Taylor, in the condition it is in now, what kind of topping would you require?

A. A minimum of one inch, not to exceed an inch and a half.

Q. What do you generally set forth in your specifications for drainage, Mr. Taylor, in a garage?

A. On a floor of this kind, it would be considerably less than you have. Probably on this particular area I would not go over an eighth.

Q. Now, you naturally have a little difference in the slope of the drainage the nearer it gets to the catch basin or hole it goes out of. You increase your slope the nearer the catch basin?

A. We normally don't increase the slope at all, except at the area immediately at the basin. There is a certain very small area that you trowel to make sure—you set your basin probably a quarter of an inch low, and then a foot area around that you trowel off to get the drainage there, but we don't carry it back any distance.

Q. You don't carry any drainage back?

A. No additional slope. [575]

Q. Then how much do you carry, say a foot back?

A. An eighth of an inch from a foot on back.

Q. But what do you require from there on down to the drain?

(Testimony of Maynard Taylor.)

A. Actually, all we require is an eighth of an inch. The contractor, normally, to protect himself against human error, will set the drain slightly low so he is sure he has drainage.

Q. You think there were two drains there in the floor when you were there?

A. As I remember that is what I observed; however, there could be more.

Q. So, Mr. Taylor, would you mind coming down here just for the convenience of the jury to see this, and look at the plat referred to as BCG 10, and tell the jury how many drains there should be, if the floor was built according to the plans?

A. This drawing indicates one, two, three, four, five, six drains in the rear area.

Q. Mr. Taylor, isn't there seven? Here's a blueprint of the same thing that might be a little clearer.

A. Oh, excuse me—I take it back. There's one that isn't clear on there. There is seven—that's correct.

Q. Now, would you check that just a moment. Don't you think all of those drains are necessary if the floor is properly built and constructed? [576]

A. As I said—do you have a drawing showing the expansion joints?

Q. I don't believe we do.

A. Ordinarily, we would drain each area around an expansion joint.

Q. But do you think that seven catch basins or drains would be necessary for a building of that size?

(Testimony of Maynard Taylor.)

A. I probably, in the interest of economy, I probably would not design it with quite that many.

Q. You saw two there, when you were down inspecting it the other day? A. Yes.

Q. Mr. Taylor, you wouldn't allow any topping to be just scattered in the low spots and troweled out to an edge anywhere, would you?

A. No.

Q. What would happen if you did that?

A. It would crack and fall off.

Q. Crack and break? A. Yes.

Q. Would it also break more, say in a garage where they have heavy tools and jacks with which cars are jacked upon a rail and moved? Would that have a tendency to break it worse?

A. Worse than what? [577]

Q. Worse than it would in an ordinary floor somewhere?

A. Naturally it will break easier with heavy work, yes.

Q. Mr. Taylor, you have, I take it, designed and superintended the design and structure of buildings similar to this? A. Yes.

Q. Did you ever handle a garage floor?

A. Yes.

Q. Are you generally pretty strict about getting a garage floor in good shape?

A. Yes. However, I would say we were no more strict than we would be in a public store, for example, if you are going to use a finished concrete. The last garage we supervised and completed, at

(Testimony of Maynard Taylor.)

that time the area was such that we only used one drain and we sloped all one direction.

Q. You used a rather large drain and sloped everything one way? A. Yes.

Q. But, generally, on a large space of concrete floor, you do use more than one drain?

A. Oh, yes.

Q. Did that one properly drain? A. Yes.

Mr. Bell: That is all.

Redirect Examination

Q. (By Mr. Arnell): [578] Mr. Bell asked you about the area along the west wall and I believe you testified in response to one of my questions about that. Now, the area around the hoist, Mr. Taylor, would that have to be virtually flat—the concrete?

A. You mean whether or not that would have 3/16ths inch slope at that particular area?

Q. My question is: Would it be good construction practice to have that degree of slope underneath the hoist area?

A. We wouldn't, no.

Q. In other words, in order for the hoist to function properly, your grade would have to be much less than that, would it not?

A. There are different types of hoists, but this type you have out there—the setting and maintenance of the equipment would be easier with the floor area flat in that particular small area, yes.

Q. Do you believe, at this time, Mr. Taylor, that

(Testimony of Maynard Taylor.)
the floor could be repaired by the application of magnacite, as you have previously described to the jury?

A. I think it could be. As I said, I have only had physical observation of two areas. I might want to observe whether or not there were other areas that I have not had the benefit of observing. that need it; however, based on those two areas, I would say yes, it could be corrected.

Mr. Arnell: I believe that's all. [579]

Mr. Bell: Just one question.

Recross Examination

Q. (By Mr. Bell): Mr. Taylor, do you think it would make this hoist better by having the water hole around it, or would it be better if it was drained?

A. The obvious answer is it would be better if it was dry.

Mr. Bell: That is all.

Court: That is all. Another witness may be called.

Whereupon,

LORN E. ANDERSON

was called as a witness on behalf of the plaintiff, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Arnell): Would you state your full name, Mr. Anderson, please?

(Testimony of Lorn E. Anderson.)

A. Lorn E. Anderson.

Q. Are you acquainted with Mr. Carr?

A. Yes, sir.

Q. When did you first become acquainted with him?

A. The first part of 1950. I don't remember what the date would be—either the fall of 1949, or the first part of 1950.

Q. Would you state for whom you are working now, Mr. Anderson, please?

A. District Engineers. [580]

Q. Are you an engineer by profession?

A. Yes, sir.

Q. Were you graduated from a university?

A. Yes, sir. I was graduated from Oregon State College.

Q. In what field of engineering?

A. Structural engineer.

Q. Did you have occasion, in the year of 1950, to work for Mr. Carr?

A. Yes, sir. I did.

Q. Would you relate to the jury, briefly, what that work consisted of?

A. I was employed by Mr. Carr to design the garage, or I should say, complete the design of a garage that he was building on Fifth Avenue and Denali Street. It consisted actually of two parts—one part was for a change in the foundation that had already been built, and the second part was for completion of the structure.

Q. Did you revise the first plan that was drawn,

(Testimony of Lorn E. Anderson.)

for the purpose of moving the building back and tearing out a portion of the old foundation already constructed?

A. I didn't revise the plan. I drew the plan which is now in evidence.

Q. Is that the only plan that was in existence at the time the first contract was signed on May 25th, 1950?

A. It was the only plan in that contract. We had started work [581] on the remainder of the building, but it was not part of the original contract.

Q. What work was contemplated at the time the foundation layout was drawn by you?

A. The work contemplated was actually in two parts. The first part we were asked to do was to draw a plan indicating the work that had to be done to move the foundation back the ten feet required by the City. In order to move it back ten feet, we had to come off at a point where the steel set on the foundation, and we had to move it back actually twelve feet, three inches, if I remember correctly, but it consisted of taking out the front twelve feet, three inches, chipping that concrete out, putting a wall across in the same manner it was before, with part of it straight and part of it diagonal to the corner. Also, chipping out the back wall and putting in a new wall twelve feet, three inches back of that where the connecting wall to the east and west side is.

Q. I hand you Plaintiff's Exhibit 3, Mr. Ander-

(Testimony of Lorn E. Anderson.)

son, and ask you to state whether or not that is the plan to which your testimony refers?

A. It is.

Q. At the time of the signing of the first contract for the work that is required by that particular plan, was there any intent to include within the contract, so far as you [582] know, the area known as the boiler room?

A. This contract was let and was to be charged to the City, because this was the amount of work that was included that they would have to pay for in taking out the ten feet in order to widen that street, and this original contract was let to cover that part. The boiler room was not a part of the first contract at the time that it was let.

Q. Did you, subsequent to the time of the preparation of this plan, complete all of the plans under which this building was to be constructed?

A. Yes, sir.

Q. You have heard the testimony here. I will try to be as brief as possible. Are those plans the ones that have been introduced into evidence here?

A. Yes, sir.

Q. How long, Mr. Anderson, did you serve as architect, or inspector, of this job for Mr. Carr?

A. I was working as Mr. Carr's representative up until about January 20, 1951.

Q. I hand you here Plaintiff's Exhibit 7, and ask you if that letter bears your signature?

A. Yes, it does.

Q. That is the letter which approves or author-

(Testimony of Lorn E. Anderson.)

izes certain extra work to be done, is it not, Mr. Anderson? A. Yes, it is. [583]

Q. Will you describe briefly for the jury what that work included?

A. In the first item, Item A here, it is "Install an 8'x8' overhead, hand operated door in the south wall." That is the door in the rear of the building that was put in to let cars out of the washmobile and it is on the side towards the alley. It included leaving out part of the concrete blocks and putting in an overhead door which was 8'x8'. The second item is "Remove the northwest 3'0" by 6'8" door in the northeast wall and install a 4'6"7' plate glass window in its stead." That is an ordinary passenger door, or personnel door, in the northeast wall. That is a diagonal wall on the front of the building. In other words, they took out one of the doors in the front of the building and put in a plate glass window instead. The third item is "Install a 2'6" by 5'0" by 6' slab—reinforced slab—over the boiler room stair landing. The compressor shall be relocated to this position." The fourth item is "Move the fuel pumps to a position sixteen inches from the face of the northeast wall." That was to move the pumps out. I believe, I don't remember just exactly, but they were picked up from one place and moved a few feet in that instance. The fifth item is "Install a two-plunger hoist in lieu of the one-plunger hoist shown." On this item, Mr. Carr furnished us with descriptive literature [584] which we, in turn, furnished Mr. Gothberg for his infor-

(Testimony of Lorn E. Anderson.)

mation, and which a one-plunger hoist was indicated, and it was later determined that a two-plunger hoist was wanted, and, in turn, we had Mr. Gothberg put in the holes for a two-plunger hoist. The sixth item is to "increase the height of all plate glass windows to seven feet." That is along the front of the building on Fifth Avenue, and on the northeast wall by the gas pumps. Mr. Carr decided that he would like windows seven feet high instead of six feet high and, in turn, they were increased a foot. The seventh item is "The northeast wall is to be changed to a spander construction by pouring three columns in this wall." Originally it called for block construction with two doors in it, and after the contract was let, Mr. Carr decided he would like some windows in that wall so, in turn, instead of using blocks, we had to go to spandrel construction, which is actually three concrete posts over which you have a steel beam to hold up the concrete blocks that are above that, and the windows were put in that area. There is another change. We provided for a second window and there is a door in that area. In order to make the wall structurally sound, it was necessary to pour concrete columns and a spandrel beam to hold up the blocks above it and also to hold the marquee.

Q. Are you familiar with the stage of the building and boiler [585] room at the time the second contract was signed on September 19th, 1950?

A. Yes, sir, I was.

(Testimony of Lorn E. Anderson.)

Q. What was the stage of completion of the boiler room at that time?

A. The boiler room—the walls were built, the stairs were constructed, and everything but the roof slab was on it.

Q. Was the boiler room floor also poured at that time? A. Yes, sir.

Q. In other words, the boiler room was complete, with the exception of the top floor slab, at the time the contract was signed?

A. That is correct.

Q. Are you able to give the jury an estimate of the value of the extra cost of the boiler room, Mr. Anderson?

A. That is the extra cost of the boiler room over this change in the wall that's called for in the first contract?

Q. Yes, the difference in the cost that would arise by reason of the construction of the boiler room?

A. That room should be worth about $10.00 per square foot. If I remember correctly, it was about 13 by 17, or 14 by 17. Has that been brought out, what the exact dimensions are?

Court: It has been mentioned several times. You better look at the specifications. [586]

Mr. Anderson: I believe that was 14 by 17.

Court: You better be sure, because one witness, Mr. Rivers, based his testimony on certain measurements and we found they were not actual.

Q. Would you look at the plan here, Mr. An-

(Testimony of Lorn E. Anderson.)

derson, before you testify, which is Plaintiff's Exhibit 4F?

A. It is 17 feet by 13 feet 4 inches. Estimating what that room is worth at about $10.00 a square foot, that would make a total worth of about $2,210.00, less the foundation walls, which he has here, which are, let's say, 17 plus 13 would be 30 feet long by 3 feet high, and your foundation of one foot, which is worth about $2.50 a square foot, or about $300.00. That would make a net of $1,910.00 approximately.

Q. Would that include the contractor's profit?

A. Yes, sir.

Q. Then, in your opinion, Mr. Anderson, is a charge of $1,509.84 a fair and reasonable charge for the extra work in installing the boiler room?

A. Yes, sir.

Q. Did you prepare all of the specifications that are specified in this litigation, Mr. Anderson? All the specifications?

A. I did not prepare them all personally. I had hired personnel under me that did prepare all of them.

Q. Are you familiar with all of them, then?

A. Yes, sir.

Q. Directing your attention, Mr. Anderson, to page SW-1 again—the last sentence in the first paragraph, which reads: "This work shall include a concrete apron by the gas pumps, but shall not include the wallboard or finish carpentry on any interior partitions, with the exception of the shower

(Testimony of Lorn E. Anderson.)

room and one restroom." I believe the original plans called for a block wall across the middle of the building, did they not?

A. Yes, a block fire wall.

Q. How high was that wall to be?

A. As I remember, it is eight feet.

Q. Did the plans and specifications contemplate any partition or wall to be constructed above that height of eight feet?

A. Not in this contract, no.

Q. Do you know what type of wall actually was constructed?

A. Yes, I have been in the building since and there is a frame wall. I don't remember just exactly what it consists of.

Q. Do you know with whose permission that change was made? A. No, I don't.

Q. Did you ever have any discussions with Mr. Gothberg about it? A. No, I haven't.

Q. Did you have any discussion with Mr. Carr?

A. No. [588]

Q. Does the existing partition go beyond the height of eight feet, Mr. Anderson?

A. I don't remember.

Q. Now, going back to this portion of the specifications that I directed to your attention. Would you explain to the jury what work on the interior portion of the building would constitute extra work? Would you like to look at the floor plan before you try to answer? A. I believe I better.

Court: I think before we go into that we ought

(Testimony of Lorn E. Anderson.)

to take a recess. Ladies and gentlemen of the jury, you will remember the admonitions of the Court as to duty and the court will stand in recess for 10 minutes.

Whereupon the court at 3:55 o'clock, p.m., recessed until 4:05 o'clock, p.m., at which time the following proceedings were had:

Court: The record may show that all jurors are present. The witness may resume the stand and counsel may proceed with examination.

Q. Mr. Anderson, I will ask you how high the partition across the building was, according to the original plans and specifications. Are you able to state how high it is?

A. That was a block wall eight feet high.

Q. Did the plans provide for going on up above that at all?

A. No, they did not. The part above that was not considered [589] in this contract. They wanted it for storage space up there and it was considered that the fire wall was put in at eight feet high in order to catch any flash fires, or such, that might burn up your garage part. This fire wall would protect people in the show room and give them a chance to get out in case there was a gasoline fire or quick fire back there.

Q. Now, was any finished carpentry in the interior, under the plans and specifications, included within the $38,000 contract? A. Yes.

Q. What portion?

A. There was a shower room, a wash room for

(Testimony of Lorn E. Anderson.)

the men in the back; also one restroom. Although there are two shown on the plans, only one restroom was to be finished. It also included the outside finish carpentry around the windows and so on, and also included the outside doors had to be put in in the show room part of it. All the finish carpentry had to be done in the work part of the garage.

Q. Including the show room?

A. No, not including the show room. Just the back, approximately 70 feet, I think it was, or 68 feet—the back part there.

Q. At the time the contract was let, did you make any estimate of the amount of cost that would be required to finish the [590] portion of the building that was not included within the scope of the specifications?

A. No, we had not made a complete estimate on that at that time.

Q. Are you able, for the benefit of the jury, Mr. Anderson, to arrive at a computation of the amount of the total cost of finishing the interior portion of the building, that was not included within the scope of the contract?

A. The finish work in the show room part would run approximately $5.00 per square foot for that finish work.

Q. Approximately what would that cost be then?

A. That would be about $7,500.00 for all the finish work.

Q. Would that include the small partitions in

(Testimony of Lorn E. Anderson.)
the office space and everything, part of which was done by Husky Furniture?

A. Yes, that would include the two offices, the counter for the parts room and also include all the finish on the walls, the furring, the hanging of the ceiling, the trim of the doors and the windows, that is, the mill work around the doors and windows. Well, all the finish work in there.

Q. In your opinion, Mr. Anderson, would the figure of $5,351.74 be a fair and reasonable cost for the interior finish work that was done by Mr. Gothberg?

A. I am not familiar with exactly what was done by Mr. Gothberg.

Q. Would that be a fair figure, exclusive of the work that was [591] done by the Husky Furniture for the rough-in finish work that was not within the scope of the contract?

A. Would you tell me what Husky Furniture did?

Court: Counsel, a little while ago was seeking to keep all of this out. Now, does he want to bring in Husky? If he does, go ahead. It doesn't matter in the least to me.

Mr. Arnell: I think, your Honor, it is proper rebuttal.

Court: All right. Go ahead.

Q. There has been testimony before the court, Mr. Anderson, that Mr. Carr paid the Husky Furniture Company approximately $2,700.00 for certain finishing work, which I think included the

(Testimony of Lorn E. Anderson.)

plywood finishing, and the finishing around the office and in the parts room?

A. Well, that would leave about $5,000.00, or approximately $5,000.00 for the rest of the finish work done then, in that show room.

Q. Would that, in your estimation, be a fair and reasonable figure?

A. I would say it would, yes.

Q. Mr. Anderson, did the plans and specifications contemplate the installation of a three-paneled door, or three doors, as a part of the original contract, or as a part of the extra work?

A. The scope of the work, as written, excluded the finish carpentry, which would include those doors; therefore, the [592] doors are excluded from the original contract and would be an extra.

Q. Did you design the marquee also, Mr. Anderson? A. Yes, sir, I did.

Q. Are you familiar with the manner in which it was constructed, and the conditions that were incurred during construction?

A. Yes, sir.

Q. Was it necessary to install extra beams or more beams, I should say perhaps, than were available on the job?

A. Yes, there was a channel that ran across the back of the structural member of the marquee, which were 2 by 14 lumber, and that channel was run across the back to support the back of the 2 by 14's, so when snow got on the marquee it wouldn't drop down, and it was also necessary to put in a

(Testimony of Lorn E. Anderson.)

support on the front of the building down to that channel.

Q. Under your interpretation of the specifications, would the cost, and also the installation of the beam, be an additional charge for which Mr. Gothberg would be entitled to reimbursement?

A. The specifications stated there was steel on the job. The amount of steel was not stated. At the time the contract was let, we did not have information as to how much steel was there. My interpretation of the specifications would say that the cost of the beam itself would be extra; however, the installation was required by the contractor.

Q. Are you familiar with the existence of the sign and sign post out on the building, Mr. Anderson? A. I am.

Q. Do you know how that was attached to the structure of the building?

A. Yes. There was a four-inch pipe run out from that 14 inch wide flanged beam. The pipe was welded near the top of the beam and it also had a brace to help support it.

Q. What extra work, if any, did the attaching of that sign beam cause?

A. Well, due to the attachment of that support for the snow, we had to take care of the twisting of that 14-inch wide flanged beam. In other words, you had a web of the beam—the upright member of the beam—you had the pipe attached on to it, which in turn had a tendency to turn over the beam, which made it structurally unsafe. Due to the size of the

(Testimony of Lorn E. Anderson.)

pipe, we had to consider that they could hang whatever weight sign they wanted on that—whatever the pipe would hold. Therefore, we had to fasten from the top of that beam back to the next brace, and on back to the second, in order to keep that 14 inch wide flanged beam from turning over, causing a twisting movement in it, and at the same time that that was done, we used those beams for support over that area. In other words, we could have put [594] something else in, but when this sign was attached, we put in steel and used it for both purposes.

Q. Mr. Anderson, can you state to the jury where the location of the compressor originally was established, according to the plans?

A. The plans showed two compressors there—underneath the work bench along the west wall, and there in front of the shower room.

Q. Was the location of the compressors, or the type of compressors, changed?

A. At the time those two compressors were put in there, under the work bench, we did not know what type of compressor the owner intended to furnish, and the compressor that arrived was bigger than we planned on putting in; therefore, it had to be moved to a place where we could get it in.

Q. Would extra piping and material necessary to change the location of the compressor, then, constitute a flat extra charge?

A. Yes, it is included in that letter I talked about a few minutes ago.

(Testimony of Lorn E. Anderson.)

Q. You mentioned the hoist briefly, Mr. Anderson. What type of plan was originally contemplated so far as the hoist was concerned?

A. Mr. Carr gave us a folder of descriptive literature on a [595] hoist. It had several different types and sizes of hoists in it. The one that was checked in that folder was a one-plunger hoist. In other words, there was just one oil plunger in the center of the hoist to raise the car, and that was originally contemplated in the contract.

Q. What type were installed, if you know?

A. There was one two-plunger hoist installed.

Q. Was there also provision made for another two-plunger hoist?

A. There was provision made for another hoist similar.

Q. Did that constitute an additional charge under the contract?

A. Yes, it would cost more to excavate and put in forms, and so on, for two plungers than it would for one.

Q. Where was the original location of the washmobile?

A. In the southeast corner of the building.

Q. In its present location?

A. It is further away from the east wall than originally called for.

Q. Are you familiar with the alteration that was required by the size of the door, Mr. Anderson, with respect to the structural steel?

A. You mean the 12 by 12 door?

(Testimony of Lorn E. Anderson.)

Q. Yes. A. Yes, I am.

Q. Would you explain to the jury what was required as a result of the dimensions of the door?

A. On the 12 by 12 door, it was hung on two steel trusses—between those steel trusses there was a brace that went in. There wasn't 12 feet between the wall and that brace. Therefore, when the door went up, it would hit that brace and not completely open. It was therefore necessary to move that brace back further towards the center of the building in order to make room for that 12 by 12 foot door in a raised position.

Q. Mr. Anderson, was there any change in design in the size or type of the locker rooms or type of fixtures put in them?

A. The locker room, as installed, is not as designed. However, I don't know what changes were in that. I am not too familiar with it.

Q. Was the concrete ramp in front of the building enlarged or extended, or do you have any knowledge of that? A. I don't remember.

Q. Are you familiar with the type of heating equipment in the building?

A. Generally, yes.

Q. Was the original design of either the old or a portion of the heating equipment changed as a result of any alteration in the building or in partitions? A. Not that I know of.

Q. Mr. Anderson, I hand you Plaintiff's Exhibit 9, which is a [597] list of the charges that had been submitted to Mr. Carr. I think those were all

(Testimony of Lorn E. Anderson.)

included within your letter of December 18th. Would you state what the first item is?

A. Item A, as listed here, is one 8 by 8 door in the south wall.

Q. What is the charge set opposite that?

A. $211.99 total.

Q. Does that include the door, and also the labor of installation?

A. Door, freight, delivery charge, jamb, and stops—and labor.

Q. In your opinion, Mr. Anderson, is that a fair and reasonable charge? A. Yes.

Q. What is the next item?

Mr. Bell: What is he looking at?

Mr. Arnell: Plaintiff's Exhibit 9.

A. Item B is "Two plate glass, the molding, the freight, frame and trim, and 15 hours of labor."

Q. What is the amount? $259.59.

Q. What does it include?

A. It includes the glass, the molding, freight, frame, and trim, and the labor.

Q. In your opinion, is that a fair and reasonable charge?

A. I don't rightly know the price of glass. The labor looks in [598] order.

Q. And what is the next item?

A. Item C is "Platform for air compressor, lumber, labor—12 hours at $3.55—total, $57.40.

Q. Is that a result of the relocation of the air compressor?

A. From the previous document I read, I would

(Testimony of Lorn E. Anderson.)

imagine this is the platform specified in that document. It doesn't say what the platform is, but that platform was put in for the compressor.

Q. In your opinion, is that a fair and reasonable charge?

A. That is approximately correct.

Q. What is the next item?

A. "Relocate pumps, $13.63."

Q. Is that a fair charge for moving the pumps, in your opinion, or do you have any personal knowledge——

A. I don't know just where they were moved, or how much. I don't know whether that is a fair price or not, without further description of the actual work accomplished.

Q. What is the next item?

A. "Install two-plunger hoist in lieu of one-plunger, plumbing, 40% of bill, $189.49; labor—28 hours at $3.18, for a total of $164.84."

Q. In your opinion, Mr. Anderson, is that a fair and reasonable charge for extra and additional work? A. Yes. [599]

Q. What is the last item on there, Mr. Anderson?

A. The last item is beam and three-column concrete, 5 yards, including pouring at $39.75, lumber framing, rods and buttons, steel—185 pounds at 10c, labor framing, 62 hours at $3.55, labor, 11% insurance and tax on $504.39—wait a minute, that was not part of the item. The total is $480.18.

Q. Is that the work you previously described on

(Testimony of Lorn E. Anderson.)
the columns on the steel beam across the windows in the front of the building?

A. I would assume that was the spandrel in the columns.

Q. In your opinion, Mr. Anderson, does that represent a fair and reasonable charge for that extra work?

Mr. Bell: Object for the reason that he has never seen the work and he doesn't know anything about it. He says he hasn't seen it.

Court: If you haven't seen it, sir, you are not eligible to answer.

Q. Have you seen the columns in the concrete beam? A. Yes.

Court: Objection overruled. You may answer.

Mr. Bell: May I ask a question. When did you see it?

Mr. Anderson: I have seen it several times. I saw the building approximately twice a week up until sometime in January, sometime shortly after the 20th of January, and I have [600] seen it several times since. I have been in the building approximately five times since that time.

Court: The objection is overruled. The witness may answer.

A. On the basis of the unit prices and the quantities given here, it is a correct figure, or it is an approximately right amount.

Mr. Arnell: Your witness.

Court: We have another matter coming up. In fact, the party should be here now, and before we

start cross examination, I think we will continue the trial until tomorrow morning at 10:00 o'clock. Ladies and gentlemen of the jury, you will remember the admonitions of the Court as to duty, and the trial of this case will be continued until 10:00 o'clock tomorrow morning.

Mr. Arnell: Can you be here, Mr. Anderson?

Mr. Anderson: Yes, sir. I would rather leave now, if I can.

Whereupon at 4:30 o'clock, p.m., October 1, 1952, the trial of the above entitled cause was continued until 10:00 o'clock, a.m., October 2, 1952.

Be it Further Remembered, That at 10:00 o'clock, a.m. October 2, 1952, the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, except Mrs. Ellen [601] Curtiss, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: Mrs. Curtiss had reported by telephone that her son is seriously ill and she is obliged to remain with him, and therefore she will be excused and the remaining alternate juror will serve as a regular juror—Mrs. Linder. The witness may resume the stand.

Mr. Arnell: If your Honor please, we have Mr. Young. He was here yesterday afternoon, and he is obliged to leave before noon, and Mr. Bell has agreed that he be put on.

Court: Very well. He may come forward.

Whereupon,

KEITH F. YOUNG

was called as a witness on behalf of the plaintiff, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Arnell): Would you state your full name, Mr. Young, please?

A. Keith F. Young.

Q. And what is your occupation?

A. I am manager and partner in Anchorage Installation Company.

Q. How long have you been associated and engaged in that business, Mr. Young?

A. I have been in that business for approximately eleven years in Anchorage. [602]

Q. Are you personally acquainted with both Mr. Gothberg and Mr. Carr? A. Yes, I am.

Q. How long have you known each of them?

A. I have known Vic Gothberg for about six years, and I have known Mr. Carr for approximately five years.

Q. Has your firm ever had occasion to do any contract work, or sub-contract work, in the building known as the Nash Garage?

A. Yes, our firm had a sub-contract under Gothberg Construction Company in the subject building.

Q. Would you describe briefly to the jury, Mr. Young, what the scope of your work was under that contract?

A. The approximate scope of our work included

(Testimony of Keith F. Young.)

the installation of a complete steam heating system, with controls, piping, heat exchanges, and installation of plumbing fixtures, pipings and drains, that were specified on the job.

Q. Did your firm install an air compressor that is located in that building?

A. That I do not remember. If we did, it was not part of our sub-contract. It may have been an extra item. I don't specifically remember the air compressor.

Q. Did you do the plumbing work in connection with the washmobile? A. Yes, we did.

Q. Did you also do the plumbing work in connection with the installation of the heating units?

A. Yes.

Q. Mr. Young, did you install any of the thermostats in connection with the heating equipment?

A. No, we did not. The thermostats were to be furnished by us and they were to be installed by the electrical contractor, and we would furnish as many thermostats as the electrical contractor wanted, up to the number that were actually specified on the job.

Q. Mr. Young, I hand you Defendant's Exhibit I, and ask you to examine the two statements attached to that exhibit. Are those duplicate statements which your firm sends to people who do business with you? A. That's right.

Q. Now, would you examine the organe statement, and state what work, as you recall, that statement represents?

(Testimony of Keith F. Young.)

A. This is a work order and these work orders are made out in response to a telephone request for work by a customer, and the nature of the work described here states furnished labor and material to install air lines, and relocation of water line in front of building. It is my recollection that there is an extra work order signed by Mr. Carr in existence that covers this particular job.

Mr. Bell: I move to strike that, your Honor. It is not [604] responsive to the question at all and for the further reason that the work order, if it exists, would be the best evidence.

Court: The motion is granted on the second count. The work order is the best evidence.

Q. Mr. Young, I hand you Defendant's Exhibit 13, and ask you to examine it.

A. This is the work order to which I referred a moment ago. An order for extra work ordered by the owner——

Mr. Bell: I object to the witness making a speech. He is not answering the question. He was asked to identify the document.

Court: Overruled.

Mr. Bell: Exception.

Q. Would you identify th edocument, Mr. Young, please?

A. It is an order for extra work ordered by the owner, and to be billed to the owner, and it is labeled No. 1.

Q. Is that work order the basis of the state-

(Testimony of Keith F. Young.)

ment contained in the other defendant's exhibit, which I submitted to you?

A. That's right. It is a work order that covers this work.

Q. Can you state, Mr. Young, whether or not the work covered by this order, also the billing, was included in Mr. Gothberg's contract, or whether it would be denominated an extra?

Mr. Bell: I object as a conclusion of the witness and he is not qualified. [605]

Court: He can say whether his company contracted with Mr. Gothberg originally to do that work, but he is not qualified to say what is in the Gothberg contract with Carr.

Q. Mr. Young, was the work, which was performed in accordance with these two exhibits, done after you had completed your contract with Mr. Gothberg?

Mr. Bell: Object to that as calling for a conclusion of the witness as to whether he had completed his job or not. That is his opinion.

Court: Overruled.

Mr. Bell: Exception.

A. I can state that the work covered by this extra work order was not part of our sub-contract with Vic Gothberg. Your Honor, may I elaborate on that statement?

Court: Yes, go ahead.

A. The mere fact that there is an extra work order in existence, signed by Mr. Carr, proves to me——

(Testimony of Keith F. Young.)

Mr. Bell: Object to the assumption of the witness. That is not testifying to a fact, but making an assumption.

Court: That is your own conclusion, sir. The objection is sustained.

Q. Mr. Young, I hand you Plaintiff's Exhibit 12, and ask you to examine it, and state whether or not you can identify it?

A. Yes, I can identify it. [606]

Q. Do you recall receiving that document?

A. Yes.

Q. Now, I hand you Defendant's Exhibit P, and ask you to examine it first. Is the statement attached and part of Exhibit P, a statement of your firm—an invoice or billing?

A. That is right.

Q. Is that the statement that was sent to you after the work called for by the work order, which you have also before you, was done?

A. The dates would indicate that that was the case.

Q. Would you examine your invoice and state what work is represented by that invoice?

A. The work covers the following notation: "This valve damaged by employees of the garage. This work chargeable to the establishment as it was not a case of faulty original installation."

Q. Did your firm deal directly with Mr. Carr on this particular job? A. That's right.

Q. Mr. Young, I hand you Plaintiff's Exhibit No. 10, and ask you to examine the invoices which

(Testimony of Keith F. Young.)

are a part thereof. Mr. Young, are the two colored pages, attached to that exhibit, invoices or billings issued by your firm? A. That's right.

Q. Would you examine the first invoice and state what work [607] that invoice covered?

A. The first invoice covers "the installation of drain piping on sand trap as per extra."

Q. Do you recall the location of that sand trap?

A. I don't recall the exact location of it. All I recall is that we were ordered to put in a sand trap. It was not part of our original contract.

Q. Would you examine the next statement and state what work is covered by that invoice?

A. This work order covers the extending of the gasoline tank vents as ordered by Mr. Carr. It says to be charged to the owner.

Q. At the time that work was done, had similar work previously been done?

A. That's right.

Q. And this was the result of the change ordered by Mr. Carr, was it?

Mr. Bell: Object to it as leading and suggestive. The question is leading, I believe.

Court: Yes, we have had a lot of leading questions, Counsel, on both sides. The objection is overruled.

Mr. Bell: Exception.

Q. Prior to that date, had the gas tanks been hooked up by your firm?

A. That's right. [608]

Court: Nevertheless, Counsel should avoid lead-

(Testimony of Keith F. Young.)

ing questions. They are never in order in this jurisdiction except in cross examination, and in special occasions where it is the only way to get at a subject.

Q. Mr. Young, under your contract with Mr. Gothberg, you were required, were you not, to furnish all of the heating units?

A. That's right.

Q. Do you recall whether or not all of those heating units were furnished?

A. To the best of my knowledge they were. I may have to elaborate on that a little bit to explain how such things occur.

Q. During the course of your work, were there any changes made, either in location of the units, or in the type of units that were installed?

A. I can't definitely state that that was the case. The job has been a long time ago and there has been many jobs since. We ordinarily would——

Mr. Bell: Object to what he ordinarily would have done. The question has been answered.

Court: Overruled. You may answer.

Mr. Bell: Exception.

A. We ordinarily would do just what the scope of our contract called for, and if we didn't do what the scope of our contract called for, it would be because we were ordered not [609] to by the contractor.

Mr. Bell: I move to strike the answer as incompetent, irrelevant and immaterial, and purely an argument and not an answer.

(Testimony of Keith F. Young.)

Court: Overruled.

Q. Mr. Young, to the best of your knowledge, did you fully and completely perform your contract with Mr. Gothberg? A. That's right.

Q. Mr. Young, are you familiar with concrete floors, insofar as they relate to plumbing, and the drainage of the plumbing system?

A. That's right.

Q. What is the customary area for a single floor drain, Mr. Young, so far as you know, in relation to your business?

Mr. Bell: Object as incompetent, irrelevant and immaterial. He is not an expert on floor drainage, and he is not qualified to give answers of that kind.

Court: The objection is sustained.

Q. Mr. Young, how long have you been in the plumbing business?

A. I have been in the plumbing business for 22 years.

Q. Have you been so engaged continuously?

A. That's right.

Q. During that period, have you ever designed floor drainage systems?

A. Very many of them. [610]

Q. Where did you do that type of designing?

A. Anchorage; Richmond, California; Billings, Montana, and Portland, Oregon.

Q. Did that designing work, that you have described, include the drainage of garages?

A. That's right.

Q. Now, I will ask you again, Mr. Young, what,

(Testimony of Keith F. Young.)

in the practice of designing garage floors and drainage, is accepted as the usual allowance for floor drains?

Mr. Bell: Object to it as incompetent, irrelevant and immaterial, and the witness is not qualified to answer and has not been qualified.

Court: Overruled.

Mr. Bell: Exception.

Court: You may answer.

A. So far as floor drains are concerned, we consider—and I am speaking from the standpoint of the plumbing contractors—that we cannot get adequate drainage in any plain surface of concrete if we have over 400 square feet draining into a single drain, without having excessive pitch in the floor. I consider excessive pitch as anything over 3/16ths of an inch to the foot.

Mr. Arnell: No further questions.

Court: Counsel for defendant may examine. [611]

Cross Examination

Q. (By Mr. Bell): Mr. Young, did you state that you had only known Mr. Carr three or four years, or what did you state?

A. I said five years.

Q. You are sure that you have not known him longer than that? A. No, I am not.

Q. Did you buy tires from him in the years of 1943 and 1944? A. That I couldn't say.

Q. Well, to refresh your memory, did you buy some tires in which some trouble came up between

(Testimony of Keith F. Young.)

you and Mr. Carr in trying to collect for them in 1943 or 1944? A. Not that I recall.

Q. Did you ever talk to Mr. Carr while you were on the job down there doing that work?

A. I think probably on about two occasions.

Q. Where were you when you talked to him?

A. I don't recall. It was probably in the subject building.

Q. Well, do you now tell the jury that you didn't ever talk to him at all?

A. Twice, that I recall.

Q. Tell the jury where you were standing, and when it was that you talked to him?

A. I don't remember.

Q. But you do remember, specifically, that you talked to him, and now you can't tell the jury where you talked to him, [612] is that right?

A. I say that I don't remember, because I would talk to Mr. Carr whenever I happened to see him, or on any occasion. It may have been in his shop or his new building. There is a lot of water under the bridge since this was done, and I have known Mr. Carr for five years, and I can't recall any specific conversation we had whatever.

Q. Don't you think it is strange that you can tell the jury you talked to him two times, yet you can't tell us any time or place where you talked to him?

Mr. Arnell: I wish to interpose an objection. The question is argumentative, and it is repetition. It was asked three times.

(Testimony of Keith F. Young.)

Court: Objection sustained.

Mr. Bell: Exception,

Q. Did you ever do any of the work down there yourself? A. No.

Q. Who did the work?

A. My mechanics.

Q. How many drains are there in the floor?

A. I don't know. I haven't examined the plans or the job since it was completed.

Q. You told the jury it would not probably drain if it had more than 400 square feet to the drain, didn't you?

A. I didn't refer to this just specifically. [613]

Q. Did your company put the drains in that were put in there?

A. Presumably, we did.

Q. And you don't know how many you put in?

A. That's right.

Q. Mr. Young, they wouldn't drain if the water couldn't get to them on account of the unevenness of the floor there, would they?

A. That is right.

Q. You still have money coming from Mr. Gothberg on this job?

A. No, we have been paid in full.

Q. When were you paid?

A. I can't state the exact date because I don't carry the data with me, and I would have to check with my bookkeeper. Presumably, in the ordinary course of events, we would be paid 30 days after the contract was completed.

(Testimony of Keith F. Young.)

Q. You signed his attachment bond that was filed in this case, didn't you? A. Right.

Q. And you do have a personal interest in this matter for some reason, don't you?

Mr. Arnell: Object to that question. It is beyond the scope of any direct examination, and it is immaterial.

Court: Overruled. It goes to the credibility of the witness—his interest in the matter, if any.

A. I have a personal interest in it in this respect, that I [614] have done contracting for Mr. Gothberg. He asked me to sign the bond and I did. If Mr. Carr had asked me to do likewise, I would have done the same for him.

Q. Now, you were familiar with these plans, weren't you, when you bid on this job for Mr. Gothberg?

A. I do many jobs. I don't examine the plans. I hire estimators, foremen and mechanics. My chief function is to try to keep enough money coming into the organization to pay the bills.

Q. Do you know what a thermostat is?

A. Yes.

Q. You stated your company was to furnish the thermostats and the electrical contractor was to install them, is that right? A. That's right.

Q. Do you know how many thermostats you furnished down there?

A. I don't recall without examining the records.

Q. Do you know how many heating units you furnished?

(Testimony of Keith F. Young.)

A. I don't know without examining the records.

Q. You know where the garage is, don't you?

A. That's right.

Q. Have you been inside of it? A. Right.

Q. When?

A. I would say—you mean the exact date? [615]

Q. No, just an estimate. I don't want to hold you to the exact date.

A. I was probably on the job each week during the course of construction.

Q. Not probably. Tell the jury if you were.

A. Yes, I was.

Q. How many times?

A. I can't tell you.

Q. Have you been there lately? A. No.

Q. Do you know how the doors open in connection with the garage?

A. I have an idea of how they open.

Q. All right. Tell the jury where the doors are located?

A. As I recall, there is a double door on the alley side on the southeast corner, and I believe there is an access door on the east side, approximately in the middle of the building, and then there is the main entrance door that opens into the northeast corner of the building.

Q. Do you mean double doors that swing both ways, or do you mean some other kind of door?

A. My recollection is that the door slides up to the ceiling, but I couldn't be sure.

Q. Now, assuming that you have the doors lo-

(Testimony of Keith F. Young.)

cated correctly in a garage—those doors, when they are open, let in cold [616] weather, do they not?

A. That's right.

Q. Is there any reason for separate heating units and separate blowers, in a building like that, to balance the heat up in the place?

A. Yes, there is a definite function.

Q. Is there a necessity for each one of those heating units to have a thermostat in the locality, that is supposed to turn on when the temperature gets to a certain spot?

A. Yes, that is the choice of the engineer that makes the layout. In a small area like that, I would consider one thermostat to control all the heaters in the continuous area.

Q. Wouldn't you consider it warmer in the northwest corner of that building than it would be in the southeast corner, where those doors are being opened all the time? A. Slightly.

Q. If it was cold outside, what would be, in your opinion, the difference in the degree of heat in there, in the northwest corner of the garage and the southeast corner? What would be the difference in degrees of heat there, normally?

A. If the big door was the only door open, when they opened the large door, the displacement of heat would be relatively small because, in order for the cold to reach the extremity of the room, there would have to be definite movement [617] of air through the cross section of the room, but inside of any building, where you have heating units oper-

(Testimony of Keith F. Young.)

ating, you have static pressure, and in order for heat to circulate there has to be displacement of this air, so if all other openings were closed and only the big doors were open, the difference would be relatively slight.

Q. How big are those two big doors you are talking about?

A. I would guess that the doors are probably 12 feet wide, and possibly 10 feet high.

Q. There is two of those, is there?

A. There is only one, so far as I know.

Q. You referred to the doors, the big doors. Is that sub-divided into two or more doors, or is it just one door?

A. It is just a figure of speech.

Q. Did you tell the jury it would be no colder by that 10 by 12 door than it would be across the building in the corner?

A. There would be a difference, but relatively slight.

Q. That is why thermostats are set at different places, so that the heating units will blow heat into the spot that is cold, and not blow it into the spot that is warm, isn't it?

A. That is a matter of the engineer on the job —how he designs it.

Q. If the engineer designs it that way, it should be done that way, shouldn't it?

A. If he designed it that way, and called for that in the contract, [618] it should be done that way.

(Testimony of Keith F. Young.)

Q. Were you there when they put in the drainage at all?

A. I might have been—I don't recall specifically.

Q. You do know there is only one thermostat in the garage, and one thermostat in the show room, don't you? A. No, I don't know that.

Q. You don't know whether you furnished all the heating units there or not, you say?

A. Unless Mr. Carr has put some in subsequent to our leaving the job, then we did furnish all the heating units.

Q. How do you know that? You say you had not been there for a long, long time. When did you see such a thing?

A. I repeat the statement I just made—that, unless Mr. Carr installed additional unit heaters after we left the job, then we put in all the unit heaters that are required under the contract.

Q. How do you know that? You haven't seen it, have you?

A. Because we would have been notified by the contractor.

Q. You are willing to testify that, because you haven't been notified by Mr. Gothberg, that everything was done right? A. Yes.

Q. Now, you put in the sand trap in one of those drainage ditches? A. Right.

Q. Why didn't you put sand traps in the others?

A. Because it wasn't called for.

Q. You only put one in, did you?

A. That's right.

(Testimony of Keith F. Young.)

Q. And charged Mr. Carr for that?

A. Right.

Q. Now, you put in new piping to the washmobile, didn't you?

A. Right.

Q. Why did you do that?

A. Because it was obvious that the pipe line to the washmobile was too small.

Q. And you took those out and replaced it?

A. Right.

Q. And you made Mr. Carr pay you for that?

A. That was not included in the scope of our original contract. It was an extra.

Q. Were you there when that happened?

A. No.

Q. Do you know what happened there?

A. Yes.

Q. Did they take the pipes all out and then say to Mr. Carr, "You have to sign this order or we won't put the new ones in?" Did your men say that?

A. I don't recall the exact circumstances, that is, the statements made regarding the installation. The job was laid out and we put in the piping according to the engineering [620] drawings.

Q. What size pipe did you put in to start with?

A. I am merely guessing again, but I think it was three-quarter or half inch.

Q. And there's lots of water used with the washeteria, isn't there?

A. Sometimes there is very little and sometimes a lot.

(Testimony of Keith F. Young.)

Q. When they are washing a car and it is turned on full, it takes a lot, doesn't it?

A. I imagine so, yes.

Q. You, as a plumber, would know half-inch pipe wouldn't carry enough water to this machine—— A. Certainly.

Q. Yet you just connected it with that type of pipe?

A. As I stated before, it was called for in the engineer's drawings, and we have no latitude in those matters.

Q. Would you please show me something in the engineer's drawings to show me what you relied upon—would you get it, Mr. Arnell, I don't know where it is—where it provides for half-inch pipe. I am handing you BCG 10, which is a part of the plaintiff's exhibit in this—being the plumbing and heating plans. Show me where it called for half-inch pipe to the washeteria?

A. Do you have the specifications? The lines are indicated here, but not on that. [621]

Q. Well, do you want to look at the specifications and see?

A. It may be that on the plans we have that the sizes are indicated.

Q. Well, it is agreed between both the plaintiff and the defendant that these are the official plans, and there is many copies of that exactly, and all three or four copies here in the courtroom are exactly alike, and you can't find anything on the plans to state the size? A. Not on this.

(Testimony of Keith F. Young.)

Q. All right now. See if you can in the specifications, and then we will discuss them.

A. There is no mention of that in the specifications, and there is no size given on this plan.

Q. Then you were mistaken as to the plans and specifications requiring that small a pipe, are you?

A. I think our plans were identical to these. Then I made a misstatement when I stated half or three-quarter inch.

Q. I see. Now, you do know it was connected with half or three-quarter inch pipe, do you?

A. Yes.

Q. And it was torn out and two-inch pipe line connected, is that right?

A. I don't recall what line was reinstalled.

Q. And that was one of the extras you have charged Mr. Carr for, and he paid you, didn't he?

A. Right.

Q. You required him to sign a statement that he would pay you before you would reconnect it?

A. No.

Q. Didn't you identify an order signed by Mr. Carr for Mr. Arnell a few minutes ago?

A. Your question indicates that we placed pressure on Mr. Carr to sign the order before we would do the work. We merely requested him to sign it, which he did.

Q. You had them tell him—they didn't scream at him, but gentlemenly told him, that you would not connect it unless he signed an order as an extra?

A. We made a civil request that he sign the

(Testimony of Keith F. Young.)

work order, just like he would be requested to sign an invoice if he went in a store and bought merchandise.

Q. Did you talk to Mr. Gothberg about that before you required Mr. Carr to sign that work order?

A. It would naturally be discussed.

Q. But you don't remember whether you did or not? A. Right.

Q. I see. Now, if it was not connected right then, in the first place, it was Mr. Gothberg's obligation then, to pay for it, wasn't it?

A. Let me point out to you that this pipe size is not specified. If there had been, in the eyes of the engineer, any great [623] necessity for sizing this a certain size, then it would have been on the plan.

Q. But you stated that you know it needs a larger pipe. You knew it then and you know it now, don't you?

A. No, I don't.

Q. Didn't you state a while ago that you knew, then, it should have been a larger pipe, and you put one in?

A. That was after the fact. It says mixing valve. Maybe he was going to have a bucket and mix hot water.

Q. You thought he was going to mix water and throw it on the cars?

A. I didn't know it was going to be used for automobiles.

Q. Did that pipe go in the ground, and then

(Testimony of Keith F. Young.)

come in the wall, and then go up the wall a ways, and then go out again on the outside?

A. Counselor, you ask me about mechanical details on this job and let me state my position again. I did not estimate this job. My men did it, and in order for me to answer mechanical details regarding construction on this job, it would be necessary for me to question the men in my employ who worked on the job originally, and make a thorough research. I have had no preparation on this whatsoever.

Q. Then, when you testified before as to detailed facts in the matter, you were merely testifying as to hearsay? You [624] are not positive about those things?

A. Some items I have specific knowledge of, and some I don't.

Q. Are the ones Mr. Arnell asked you about the ones you have specific knowledge of, and the ones I asked you about, you don't have specific knowledge?

Mr. Arnell: I think the question is strictly argumentative.

Court: Does Counsel object?

Mr. Arnell: Yes.

Court: The objection is sustained.

Mr. Bell: Exception.

Q. If the water pipe did come out of the ground above the ground, and go back into the building and come up through a wall inside, and then go out in the open again, would that be proper instal-

(Testimony of Keith F. Young.)

lation for water to use at a filling station—at the pumps?

A. I don't believe I quite understand your question. You don't make it clear enough.

Q. If naked, uninsulated pipe came above the ground——

A. Is this outside the building?

Q. Outside the building. Would it then be proper installation?

A. That depends on the function of the pipe.

Q. If it was going to furnish water outside for a hose to connect to—would that be proper installation in Anchorage? [625]

A. I am sorry to appear stupid, but I still can't understand what you are proposing in this pipe line—what you are drawing a mental picture of. I just don't get it—I am sorry.

Q. Did you not tell Mr. Arnell, a few minutes ago, that the reinstallation of that valve was due to the fault of Mr. Carr's mechanics?

A. Yes, the handle will only turn 90 degrees in one direction, and if you try to turn it the other way, it will twist off. The man didn't know enough to turn it the other way, and he couldn't get it open and he forced it open, thereby breaking the valve.

Q. Wasn't that due to freezing?

A. No.

Q. It was not? A. No.

Q. Did you see it? A. Yes.

Q. All right. Now, how many heating units did you deliver down there at the place?

(Testimony of Keith F. Young.)

A. The only way I can answer that would be to examine the job material records.

Q. You knew you were going to be a witness today? A. Yes, that's right.

Q. You didn't examine those? [626]

A. No.

Q. I see. How old are you, Mr. Young?

A. I am 41.

Q. And where were you raised?

A. I was raised in Billings, Montana.

Q. What business were you engaged in there?

A. In the plumbing and heating business.

Q. What year did you go in business in Billings, Montana?

A. I was not in business for myself. I worked for the Young Heating and Engineering Company, a business operated by the family.

Q. By your family? A. Right.

Q. Then you went from there to California?

A. I came to Alaska.

Q. Did you come to Alaska first?

A. I came to Alaska, and then went to California.

Q. Then you came back up here?

A. I was in a few places in the interim period.

Q. Now, Mr. Young, if there is 3,500 feet of floor space in the garage, and there is seven drain pipes, or seven catch basins and drains, would that, in your opinion, be enough to make the floor drain, if the floor was right?

A. Well, if I was responsible for the layout, I

(Testimony of Keith F. Young.)

would limit it to 400 square feet to the drain. [627]

Q. If it is less than that, it is an engineering defect? A. In my personal opinion, yes.

Court: Ladies and gentlemen of the jury, during the recess, you will remember the admonitions of the Court as to duty, and the court will stand in recess for 10 minutes.

Whereupon the court at 11:02 o'clock, a.m. recessed until 11:12 o'clock, a.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present. Counsel may proceed with examination of the witness.

Mr. Bell: That is all, your Honor, on cross examination.

Court: Is there any redirect examination?

Mr. Arnell: That is all.

Mr. Boward: Mr. Young, on the installation of the sand trap, if that was not a part of the specifications and plans, at whose direct request was that installed?

Mr. Young: I have to answer that in a roundabout way. Presumably, that is to say, in most cases the mechanical subcontractor, when he takes a job under a general——

Court: If you don't know, you better say so. It is all right, at times, to show the practice or custom but, if you don't know, the answer should be——

Mr. Young: The direct request came from Mr. Gothberg.

(Testimony of Keith F. Young.)

Mr. Boward: On the washmobile water line, the instructions [628] with the washmobile and the volume of water it would take, would that indicate the size of the pipe, even though the plans and the specifications did not?

Mr. Young: Yes, it would, but we didn't have that data.

Court: That is all, Mr. Young.

Mr. Bell: Just a moment.

Recross Examination

Q. (By Mr. Bell): Did you ever see the plans and specifications that were furnished with that washmobile at any time?

A. After the fact.

Q. After the fact? You mean, after it had been improperly connected and was torn out, or when did you see them?

A. After the piping you referred to was completed. We had no idea what the function of this mixing valve was at the time we laid the lines.

Q. Who had those plans and specifications?

A. I don't know.

Q. When you put those in, was the washmobile on the place?

A. No. All it says on the plans—it shows two lines coming across the building, dropping down, and it had a sample, and it said mixing valve.

Q. Was the washmobile itself there on the grounds at the time you were working there?

A. Not that I know of. [629]

(Testimony of Keith F. Young.)

Q. Did you look for it?

A. Well, we wouldn't look for it, because we wouldn't connect it. We would have no idea about it.

Q. Well, it was there in the building?

A. Maybe. I don't know, Counselor.

Mr. Bell: That's all.

Mr. Kurtz: Did I understand you to say that Mr. Gothberg instructed you to install the sand trap?

Mr. Young: Yes.

Mr. Kurtz: To whom did you send the bill?

Mr. Young: I sent the bill to Mr. Gothberg.

Mr. Kurtz: As part of your contract?

Mr. Young: No, as extra work.

Mr. Kurtz: That was not included in any bill that you sent directly to Mr. Carr then?

Mr. Young: No.

Court: That is all. Mr. Anderson may resume the stand and Counsel may proceed with examination.

Mr. Arnell: Your Honor, may I have permission to ask this witness one or two more questions?

Court: You had not closed, so far as I know.

Mr. Arnell: I think I had last night.

Court: Yes, you may. Yes, you had closed—I remember now. Well, Counsel for plaintiff may proceed.

Mr. Bell: Your Honor, we have a very busy man from over [630] at the City that has been sitting here at my request. He has that Building Code, and if you would consent, I would like to ask this

witness to step down and put him on, and let the man get away.

Court: Very well. You may come forward and be sworn. This is a witness on behalf of defendant.

Whereupon,

HARRY M. McKEE

was called as a witness on behalf of the defendant, and after being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bell): State your name, please?

A. Harry M. McKee.

Q. Mr. McKee, are you an official in connection with the administration of the Building Code in the City of Anchorage?

A. I am a building inspector, not an official.

Q. Is it your duty to inspect buildings and structural works in the City? A. It is.

Q. And as such, are you in possession of the Building Code of the City of Anchorage?

A. I am.

Q. Are you familiar with the garage in question here—the Nash Garage at the corner of Fifth and Denali? A. No, I am not. [631]

Q. Do you have the code with you, with relation to foundations for buildings similar to that, or a concrete, we will say, one story concrete building?

A. Yes.

Q. Would you please tell us what the requirement is and what section there describes that particular thing?

(Testimony of Harry M. McKee.)

Mr. Arnell: If your Honor please, I would interpose an objection to that question upon the grounds that full foundation has not been laid for the question. After all, this occurred in 1950, almost two and one-half years ago.

Court: Yes, the building, as I understand, is not a concrete building. It is a concrete foundation and pumice block. I think we ought to see if this code was in effect in 1950. Do you know?

Mr. McKee: Yes, it was.

Court: That satisfies that. The objection is overruled. The witness can testify.

A. Section 2805(a) — "Footings and Foundations: Footings and foundations, unless specifically provided, shall be constructed of masonry or concrete, and shall in all cases extend below the frost line. Footings shall be designed to minimize differential settlement."

Q. Are you acquainted with the frost line in Anchorage—the depth of it?

A. Well, yes. It varies in different parts, though. It just [632] depends what part. You take the overburden off, and it will frost down maybe nine or ten feet. It has been known to go as much as eleven feet in places.

Q. What is the average, say, on Fifth Avenue in the vicinity of Denali, or anywhere in that area? What would be the average there?

A. That I couldn't say, off hand.

Q. Would you permit, if you knew it, the building of a three foot foundation on a one-foot footing

(Testimony of Harry M. McKee.)

for a building at Fifth and Denali Street in the City of Anchorage, knowing that the frost line was similar to what it is at that place?

Mr. Arnell: If your Honor please, we interpose an objection. The witness is not competent to answer the question. It calls for an opinion which he is not qualified to pass.

Court: The objection is sustained.

Q. As I understand the code then, it does require that the fittings and foundations go down below the frost line?

A. That is in the code.

Q. And I believe you stated that the frost line in Anchorage varied from some nine feet, you said, to eleven feet?

A. Yes, and it probably comes back up some place to three feet.

Q. And goes as high as three feet in certain places. Would you explain to the jury why, if you know, that in some places the frost only goes down three feet?

A. A place where the overburden is thick on top and not removed, [633] the frost won't go down. The overburden protects the frost from penetrating in the ground.

Q. Does the disturbance of the surface, and working over the surface, have a tendency to make the frost go deeper?

A. It has.

Mr. Bell: You may take the witness.

(Testimony of Harry M. McKee.)

Cross Examination

Q. (By Mr. Arnell): Mr. McKee, did you examine the City records to determine whether or not a building permit had been issued by the City of Anchorage for this construction?

A. No, I haven't.

Q. Do you have those permits in your office?

A. We have.

Q. Would you be able to produce such a permit if it had been issued? A. Yes, sir.

Q. In the usual course of supervising this type of construction, would a permit have been issued for the construction of that building before it could progress? A. That's right.

Q. Would the permit be based on the original plans and specifications?

A. That's right. If the specifications or the plans were up to the code only. [634]

Q. But if a permit had been issued, would that imply that the City accepted the plans and specifications as complying with the code?

A. That's right. The building official checks the plans and makes the changes and issues the permit. They have to bring them up to the code.

Q. When the permit is issued then, presumably that building complies with the building ordinance then—the Building Code? A. It does.

Q. Mr. McKee, would you please produce the permit that covers this building this afternoon, or could you do it before 12:00?

A. I probably can, yes.

(Testimony of Harry M. McKee.)

Q. I hate to ask you to come back——

Court: Do you require a subpoena to justify you in bringing those papers in, or can you bring them in?

Mr. McKee: I can bring them in.

Mr. Arnell: That is all.

Mr. Bell: That's all.

Court: Mr. Anderson may resume the stand, and Counsel for plaintiff may undertake further examination if he wishes.

LORN E. ANDERSON

Redirect Examination—(Resumed)

Q. (By Mr. Arnell): Mr. Anderson, are you familiar with the provisions of the [635] contract——

Court: Mr. McKee, can you leave that book here long enough so that we can copy out of it what you read. Can you leave it with the Clerk for a little while, and when you come back again, you can pick it up? Will you mark the paragraph so we will know which one it is—just point it out?

Mr. Arnell: May I ask Mr. McKee just one more question? Do you have a copy of the plans and specifications over there?

Court: The witness better take the stand if he is going to testify.

Mr. Arnell: I just want to ask whether or not the plans and specifications were required in your office?

Mr. McKee: They probably are some place, but there is such confusion now. There are plans all

(Testimony of Lorn E. Anderson.)

over the City Hall, but we require a set of plans in the office.

Court: Very well, Mr. McKee. Counsel may proceed.

Q. Mr. Anderson, are you familiar with the provisons of the contract that relate to the occupancy of these premises while they are in the process of construction?

A. You mean occupancy by the owner before the work was completed?

Q. Yes. A. Yes, I am.

Q. Would you explain to the jury what the accepted practice is in situations where the work is under construction, and [636] the owner moves in and takes either partial or total occupancy?

Mr. Bell: Object to that as accepted practice, because in the first place he is not qualified to testify to it in Anchorage, and for the reason that that would be hearsay and a conclusion.

Court: I think the witness has not shown himself qualified as to the practice in this area, if there is any practice here. I don't know enough about building construction to know whether that practice exists anywhere.

Q. Mr. Anderson, where are you working at the Post? A. District Engineers.

Q. What are your duties?

A. Assistant project engineer at the time. We are charged with the administration of lump sum contracts for the Government. In the Project Engineer's Office we take care of the contract from

(Testimony of Lorn E. Anderson.)

its time of bid or the time of acceptance of bid up until such time as the contract is closed out. We take care of such things as questions of change on it, approval of shop drawings, approval of any materials and items of equipment that are to be furnished for the contract, and take care of modifications on the contract, showing the changes.

Q. How long have you been engaged in that type of work, Mr. Anderson? [637]

A. Three years with the District.

Q. Are you familiar with the practices in the construction trade with respect to the owner's acceptance and occupancy of premises under construction?

A. I am more familiar with Government procedure than I am with private procedure. I have been concerned with some private.

Q. Are you familiar with the general practice that results from an owner's occupancy of a building that is under construction? A. I am.

Q. When the building is partially completed, or in the process of final completion, and the owner enters into occupancy of either a part or the whole of the building, will you explain to the jury what the common practices are with respect to the determination of the rights of both owner and contractor?

Mr. Bell: Object. That is giving a conclusion he is not capable of giving, and for the further reason he has not shown himself to be competent, so far, to give any opinion on that.

(Testimony of Lorn E. Anderson.)

Court: I think the objection goes even deeper, and that is that the practice may not govern. The objection is sustained. The testimony sought to be elicited is incompetent and can in no way bind either of the parties to this action. The [638] objection is sustained.

Mr. Arnell: No further questions.

Recross Examination

Q. (By Mr. Bell): Mr. Anderson, I didn't quite catch your statement yesterday as to whether or not you were a registered architect or a registered engineer?

A. I was not asked that question yesterday. However, I am a registered engineer in the Territory of Alaska.

Q. How long have you been such?

A. I received my license in 1949.

Q. Now, Mr. Anderson, how long have you known Mr. Gothberg? A. About four years.

Q. And you have handled several matters for Mr. Gothberg, have you?

A. I have been concerned with Mr. Gothberg on one Government contract, and on this contract. I have known him personally due to this association.

Q. When did you first meet Mr. or Mrs. Carr?

A. I am not sure whether it was late in the fall of 1949, or in the spring of 1950.

Q. And what was the occasion of your meeting them?

A. Mr. Edward A. Smith, who at the time lived

(Testimony of Lorn E. Anderson.)

in the other half of the duplex I lived in, introduced me to them on the basis that Mr. Carr desired a design of a building, [639] and I had a license at the time, and they wanted me to design the building for them.

Q. Now, do you know whether Mr. Gothberg had made the arrangements for you to meet Mr. and Mrs. Carr or not?

A. He might have made the arrangements for Mr. Smith to meet them, but I didn't know.

Q. Now, did Mr. Carr show you a penciled drawing that he had made, and of approximately what he wanted built?

A. I don't remember a pencil drawing. I do remember a plan showing the floor plan of the rage.

Q. Is that the same floor plan that was used in this building? A. Approximately.

Q. I will ask you to look at this little drawing here, and state whether or not the writing along the side on this drawing here, is not your writing, to refresh your memory?

A. It is not my writing.

Q. Did you ever see that drawing before?

A. I don't remember it.

Q. Check it very carefully now, and see if you haven't put some initials on it with your own pencil?

A. I see none of my notations on this plan.

Q. Are you familiar with the notations of your associate that you just spoke of?

(Testimony of Lorn E. Anderson.)

A. Mr. Smith? [640]

Q. Mr. Smith. Do those look like his notations on there? A. I can't say.

Q. You can't say. Now, then, you don't remember ever having seen that before?

A. I do not. I may have, but I don't remember it.

Q. When did you come to Alaska?

A. 1937.

Q. And when did you come to Anchorage?

A. 1943.

Q. And have you been in the Engineer's Office ever since then?

A. No, sir. I went to work for the District Engineer in 1949.

Q. Have you been in the District Engineer's employ constantly since that time?

A. Yes, sir.

Q. And you draw a salary from the Government there? A. Yes, sir.

Q. And then you took this job of doing this work for Mr. Carr, did you? A. Yes, sir.

Q. And what business do you operate in Anchorage or out on the base? What's the name of your business that you operate?

A. I have none at the present time. At that time I was going under the name of Alaska Engineering Supply, as I remember.

Q. You were going under the name——

A. Yes, sir. We had a license to practice under that name. [641]

(Testimony of Lorn E. Anderson.)

Q. And who was the Alaska Engineering Supply? Who was it, really, that was using that name?

A. I was.

Q. And were you incorporated?

A. No, sir.

Q. That was just a fictitious name used by you?

A. It was the name of the company, the same as any other name of a company is.

Q. But it wasn't a corporation—it was just you?

A. Yes, sir.

Q. Was Mr. Smith associated with you in that?

A. He was associated with me, but not as a—well, wait a minute, I don't remember exactly how we worked out the details on it, but I believe we considered ourselves partners.

Q. Was that Edward A. Smith?

A. Yes, sir.

Q. And you are L. E. Anderson?

A. Yes, sir.

Q. Then you made a deal with Mr. Carr to draw these plans and specifications and to do certain work for him?

A. Yes, sir.

Q. What were you to do under the terms of that agreement with Mr. Carr?

A. Under the original agreement, we were to design a building [642] which is now called the Nash Garage at Fifth and Denali, and we also had a partial agreement that we might be called on to do some inspection on that job. The original agreement did not call for inspection.

(Testimony of Lorn E. Anderson.)

Q. Did you have any agreed price with Mr. Carr to do that work? A. Yes, sir.

Q. What was that agreed price?

A. 6% of the estimated contract.

Q. And you explained that to him—that you were to get 6% of the estimated cost of the building, just to draw the plans? A. Yes, sir.

Q. And you tell the jury that he agreed to that, did he? A. Yes, sir.

Q. And did you have any writing to that effect of any kind? A. No, sir.

Q. Was there once a discussion of $600.00 between you and him?

A. There was a discussion. I don't remember the amount as being $600.00—it was somewhere around that figure.

Q. Yes. Now, do you know about the date of that discussion?

A. I couldn't remember the exact date. To the best of my memory it was sometime in September.

Q. Of 1950? A. 1950. [643]

Q. Now, I hand you a check that is payable to Alaska Engineering Supply and will ask you to state whether or not you have seen that check?

A. I have seen it.

Q. Did you receive the money that was covered by that check? A. Yes, sir.

Q. And what amount? A. $2,725.71.

Q. What part of that did you receive, individually?

A. I couldn't state the exact amount that I re-

(Testimony of Lorn E. Anderson.)

ceived individually. I received approximately half of it.

Q. Well, would it be within a few dollars of half of that, one way or the other?

A. That would be approximately the amount.

Q. Who received the other half?

A. Mr. Smith.

Q. Was anyone else given any money out of that? A. No, sir.

Court: Mr. McKee is here again.

Mr. Bell: We will put him right on.

Court: You may step down, Mr. Anderson. Mr. McKee, if you are ready, you may take the stand now so that you will not be detained here. As long as Mr. McKee is here, I wonder if Counsel would object to putting into evidence, as an exhibit, the part of the building code read by Mr. McKee. I have had [644] a copy made and I can give copies to Counsel. Perhaps they better examine that first, and if there is no objection, we will mark the original as an exhibit, so the jury will have the exact language when they go out to consider their verdict. Mr. Arnell may proceed with examination of the witness, Mr. McKee. He is plaintiff's witness, I understand.

Whereupon

HARRY M. McKEE

resumed the stand and testified as follows:

Direct Examination

Q. (By Mr. Arnell): Mr. McKee, do you have

(Testimony of Harry M. McKee.)

with you the permit, which was issued by the City of Anchorage, authorizing the construction of the Nash Sales and Service building? A. I have.

Q. When was the permit issued?

A. 8-28-50.

Q. Does that permit refer to any specific set of plans? A. Yes.

Q. Does it designate them?

A. No, it was sent to the Pacific Coast Building Conference for check.

Q. What action was taken after that?

A. After the return from the Conference, with all the changes made, the building permit is issued, with the changes according to the Pacific Coast Building Conference. [645]

Q. Were any changes made in that building?

A. It doesn't say on this. We would have to get the plans for that.

Q. Perhaps we can avoid that, Mr. McKee, if you can answer this question. Because of the fact that the building was constructed in accordance with the plans that are in evidence, now can you state to the jury, is it your presumption that there were no changes in the design?

Mr. Bell: Object as incompetent, irrelevant and immaterial, and calling for an opinion of the witness, who has stated he would have to have the plans to determine that.

Court: I don't see how the witness could possibly know.

Mr. Arnell: Since counsel has objected, your

(Testimony of Harry M. McKee.)

Honor, I would like to ask Mr. McKee to produce the plans that were used.

Court: Do you think you can get the plans?

Mr. McKee: It might take a day to find them, if they are around.

Court: This case won't be finished today.

Mr. Arnell: May I look at that?

Mr. Bell: If Mr. Arnell doesn't object, we will both look at it at the same time and save time.

Q. Mr. McKee, under Item 17, I believe it is, would you read that?

Mr. Bell: Object to reading from any part of it. If he [646] wants to introduce the whole thing, it is all right, but I object to his picking out one particular part. It would be confusing.

Mr. Arnell: I would like to offer the whole thing.

Court: Is it just one sheet?

Mr. Arnell: Yes.

Court: Why not put in the whole sheet and it can be read by Counsel. We can have copies here. Can you leave it here during the noon recess?

Mr. McKee: Yes.

Court: Have you any of those blank sheets? Most of it is printed.

Mr. McKee: I will see if I can get hold of these old blanks. We have new ones now. There may be some over there, I will look.

Court: All right. You may take it with you, and if you can find an old blank, come back this afternoon at 2:00 o'clock with that sheet, and with a copy of it, and after Counsel look at the copy, perhaps

(Testimony of Harry M. McKee.)

we can admit the copy in evidence. Do Counsel consent to admission in evidence of part of the Uniform Building Code?

Mr. Bell: I do.

Mr. Arnell: No objection on my part, your Honor.

Court: It may be admitted as Defendant's Exhibit S.

Mr. Arnell: Your Honor, perhaps we could stipulate that [647] we could pick up the copy there and avoid calling Mr. McKee back.

Court: Will counsel stipulate that the copy to be furnished by Mr. McKee is a copy?

Mr. Bell: If Mr. McKee signs it with his signature, I will accept it.

Court: All right. If you will use one of the blanks and put what is written in, and sign it as a true copy, you can leave it with the clerk.

Mr. Boward: Would it be permissible to ask Mr. McKee a question?

Court: Yes, indeed.

Mr. Boward: Mr. McKee, the date of the building permit is 8-28-50?

Mr. McKee: That is correct.

Mr. Boward: According to the evidence that has been presented to the Court, the foundation in question, at the present time, was erected previous to that time. Was there a permit issued on that?

Mr. McKee: No, I don't believe there was a permit issued on that.

Court: The contract for construction of the

(Testimony of Harry M. McKee.)

foundation was signed sometime in May, I think.

Mr. McKee: We did have trouble. When we sent these plans out to the Building Conference for a check, the contractor would [648] be held up until the plans were returned with the corrections. In the meantime, they would excavate or prepare for their building. We allowed that for the benefit of the time here you are limited to build.

Court: Will you look and show whether any other permit was issued for the foundation of this building. It seems, according to the testimony here, that the foundations were put in and then the City required that the building be moved back and a separate contract was let for that—to move the front back and the back back to the rear of the lot. Would you look at your records and see if there is any permit issued for that change, or for the original foundation built before?

Mr. McKee: Who had the second contract for setting it back?

Court: Mr. Gothberg had the contract for setting it back. One witness testified as to the name of the firm that had the original contract.

Mr. Bell: It was Breeden and Smith.

Court: Breeden and Smith first put in the foundation and then the City, I think, widened the street. At any rate, it was necessary to move the front and back wall each, to the rear of the lot 12½ feet, and that was done by Mr. Gothberg. It is so near to 12 o'clock now—can you find that in the

(Testimony of Harry M. McKee.)

next three minutes—no, you better look it over. I wonder if the parties are agreeable to coming back at 1:30. Are both counsel [649] agreeable?

Mr. Bell: Yes, sir.

Mr. Arnell: Yes.

Court: What about the jury—I guess they can. All right, come back at 1:30 then. The jury will remember the admonitions of the Court as to duty, and the court will stand in recess until 1:30, and the trial will be continued until 1:30.

Whereupon at 12:00 o'clock noon, the trial of the above entitled cause was continued until 1.30 o'clock, p.m.

Be it further remembered, that at 1:30 o'clock, p.m., the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore; The Honorable Anthony J. Dimond, District Judge, presiding.

And thereupon, the following proceedings were had:

Mr. Arnell: If your Honor please, I have been, since I came into Court, served with an Answer to the Amended Complaint, and as a part of his Answer, Mr. Bell incorporates allegations stating Cross Complaint filed in this action. On my recollection of the pleadings, perhaps the record could stand on that basis. It is understood that our denial heretofore filed in reply to the Cross Complaint would stand as a part of the record, also.

(Testimony of Harry M. McKee.)

Court: That is agreeable with the Court if it is to counsel. I can send the original Answer and the Answer to the Amended Complaint to the jury, and state to the jury that the denials to the Cross Complaint stand as denied——

Mr. Bell: I think that's all right.

Court: ——to the Answer to the Amended Complaint. It may be a bit confusing to the jury. If counsel for plaintiff desires, he may file—I don't know, I will read this. At any rate, unless counsel disagree, that will be done, and if counsel for plaintiff wishes to file an Answer to the Amended Cross Complaint, he may. Mr. McKee is now here. Perhaps we better finish up with him. Mr. McKee, can you come forward and take the stand? Is this paper, which you have given me, a true and correct copy of the original record of the City of Anchorage, concerning the permit for the construction of the building, which has been testified about here?

Mr. McKee: It is.

Court: Without objection, it may be admitted in evidence as certified by Mr. McKee, and it will be admitted in evidence as Plaintiff's Exhibit No. 16.

Mr. Bell: No objection.

Mr. Arnell: Will you waive reading of it?

Mr. Bell: Sure.

Court: Without objection, it will be considered as read. [651]

Recross Examination

Q. (By Mr. Arnell): Mr. McKee, under the

(Testimony of Harry M. McKee.)

designation of 17, there appears an entry, and an interlineation in this document. Would you read that to the jury, please?

A. What part is that?

Q. Under Item 17.

A. "Plans submitted herewith, yes. Specifications herewith. Checked PCBOC OK—Aug. 23, 1950."

Q. If you know, Mr. McKee, will you state to the jury what that interlineation means?

A. We received the plans in the office of the building, and we sent them out to the Pacific Coast Building Conference in Los Angeles. It is an impartial check on plans, regardless of the city or the architect. They check plans and send them back with all corrections to be made on the building, and it is submitted back to the architect to make these corrections before the work can proceed, with the exceptions, sometimes the foundations, or, if the time is limited, we let them excavate for foundations or for footings, but that is what that paragraph is.

Q. Were there any exceptions to the plans, Mr. McKee, that your record denotes?

A. No.

Q. Were there any modifications? [652]

A. There were no modifications.

Q. Did the City require a minor change in any regard?

Mr. Bell: Object to that because he has stated he didn't know. He wasn't building inspector then.

(Testimony of Harry M. McKee.)

Court: If he knows, he can answer. If he doesn't, he can say so.

A. There is no corrections marked on here, outside of building permit was granted.

Mr. Arnell: No further questions.

Redirect Examination

Q. (By Mr. Bell): Mr. McKee, if there were some requirements made, they would have been noted on the plans and returned to the architect, you say?

A. That is correct. We carry a file in the office with corrections, and there is a copy sent to the architect that drew up the plans.

Q. I see. Can you find the plans in this particular case?

A. No, I couldn't.

Q. Would that indicate to you that possibly the plans were returned to the architect for some changes?

A. As a rule, there's one set kept in our office permanent, and the other set that they work on the job is sent to the architect for corrections and put back on the job.

Q. And you can't find either set of plans—these plans—at [653] your office?

A. No. There's plans over there—hundreds of them over there.

Q. Don't you have them numbered, or something, so they will be easy to find, Mr. McKee?

A. We do it now, but they didn't before.

(Testimony of Harry Mr. McKee.)

Q. So you don't know whether there was changes made on the plans or not, yourself, personally?

A. No, I don't.

Mr. Bell: That's all.

Court: That is all, and you may be excused from further attendance. Now, Mr. Anderson may come back once more.

Miss Wise: You didn't say anything about the very first plans or permit that was issued when the first excavation went in. Do you know anything about that?

Mr. McKee: This is the only permit that was on file in the office. That was issued the eighth month, 28th day, of 1950.

Miss Wise: Would that be kind of a retroactive permit, indicating that anything that had been started was permissible?

Mr. McKee: No, anything that happened during the time the plans were being checked, should have been checked by the building inspector, and noted.

Miss Wise: There is no indication of the work permit, or building permit, being issued on the original foundation?

Mr. McKee: This appears to be the only permit issued, and [654] that carried the building through to the finish.

Miss Wise: That's all.

Court: That is all. Mr. Anderson may resume the stand.

Whereupon

LORN E. ANDERSON

resumed the stand as a witness on behalf of the plaintiff, and testified as follows:

Recross Examination

Q. (By Mr. Bell): Mr. Anderson, when did you first meet Mr. or Mrs. Carr?

A. It was either in the fall of 1949, or spring of 1950, I wouldn't know exactly when.

Q. When did you draw those plans that's marked BCG No. 1?

A. I wouldn't remember the exact date.

Q. That is the foundation plan.

A. I don't remember the exact date. I believe there is a date on the plan.

Q. Would you look at this plan and tell the jury when you drew that, if you did draw it?

A. It is dated April 5, 1950. That would be the date of completion of the plan.

Q. April 5, 1950? Is that the first plan, now, that was drawn by you or your associate?

A. This was the first final plan. There were preliminary plans before this, but this is the first final plan.

Q. Where are those preliminary plans?

A. I imagine I have destroyed them. They were merely sketches [655] to give an idea of what we were going to do.

Q. Was that similar to the one you saw here this morning, and said you had never seen it before? Were the preliminary plans similar to that?

(Testimony of Lorn E. Anderson.)

A. No, it would be very similar to the one you have there as BCG 1.

Q. Do you think that is a preliminary plan, or is that one of the final plans?

A. That was a final plan.

Q. And that was dated in April of 1950?

A Yes, sir.

Q. Now, I am calling your attention to BCG 8. I will ask you to state to the jury the date that you drew that, if you did draw it?

A. It is dated August 21st, 1950.

Q. Now, that is evidently the date that that plan was first brought into existence as a finished plan, wasn't it?

A. That was the date that it was drawn up in the finished plan, made up into the final set, yes.

Q. Now, Mr. Anderson, would you look at this drawing here, in the middle, and tell us what that represents—from there across, and back down to there. Is that steel?

A. That is a 12-foot channel, weighing 20.7 tons per foot.

Q. And that is a steel channel—iron, is it?

A. Yes, sir. [656]

Q. And when you drew this plan, you drew that in there, did you?

A. Yes, sir. I don't believe that I did the actual drawing on this; however, I am responsible for the drawing here.

Q. I will ask you what that instrument is to the right in the middle of the plan, and to the right

(Testimony of Lorn E. Anderson.)

side. What does that represent? It says beam, does it not?

A. That is the 14 inch wide flange—30 pound beam for the door.

Q. Steel beam?

A. Yes, sir.

Q. Then is this the marquee here—the drawing for the marquee?

A. It is a structural drawing for the marquee, and it also has some architectural details on it.

Q. Now, was the contract let to Mr. Gothberg based upon these plans, the whole set of plans, all the way through?

A. Yes, sir. Wait a minute—there were two contracts.

Q. I am speaking of the main contract—September 19th—for the building? A. Yes, sir.

Q. Well, now, please tell me why you told Mr. Arnell that there was no provision for the steel beam at the marquee?

A. No provision for this channel?

Q. Yes.

A. In the specifications—in the scope of the work I believe [657] it is—or in the first part of the specifications, it reads that there is steel on the job. There is no weight of steel shown there, because we did not have the amount of steel, and did not know the amount of steel that was there at that time, and therefore the installation of this beam is a part of Mr. Gothberg's contract. However, from the specifications, the contractor would assume that all the

(Testimony of Lorn E. Anderson.)

steel is there, with that statement that's in the specifications.

Q. But what you mean to say is that your drawings provided for the steel, but that you exempted them by some other clause in the specifications, is that right? A. Exempted the actual steel.

Q. But the drawings shows the very beam that you are talking about?

A. Yes, sir, so that he can install it.

Q. I will hold this up here. Would you step down to save putting it up on the wall again, and just point here and tell the jury—point to the steel beam?

A. This steel channel here—also, the steel channel running across here.

Q. What is this instrument here?

A. This instrument is an angle iron support to hold the end of this channel from lifting up, due to weight at the end of this marquee. [658]

Q. Was the marquee built according to the specifications and plans by Mr. Gothberg?

A. Yes, sir.

Q. Then those pieces of steel drawn in there, are they all in place? A. Yes, sir.

Q. And that is all the steel that you requested, that is drawn there?

A. No, that is not all the steel required on the job.

Q. I mean for the marquee only?

A. That is all the structural steel for the marquee.

(Testimony of Lorn E. Anderson.)

Q. Yes. That is all. Now, I want you to show me the part of the specifications that make that drawing ineffective?

A. I can't show you any such thing.

Q. Well, you said the specifications had some clause that prevented the contractor from having to put that piece of steel, or having to furnish that piece of steel. Now, what in the specifications——

A. There is a statement in the specifications.

Q. Read it to the jury.

A. It's under Special Conditions. Paragraph SC-1, sub-paragraph C: "Structural steel is on site, but is not in place and consists of .... pounds."

Q. What is there in that to say that he could exempt himself from complying with the plans and specifications? [659]

A. It says structural steel is on site.

Q. Does it say how much, or anything about it?

A. No, sir, because that information wasn't available.

Q. Did you ever see the structural steel plans?

A. I have seen shop drawings of the structural steel, yes, sir.

Q. I believe you stated to Mr. Arnell that you had not seen the structural steel drawings. I will ask you to examine this and see if you haven't seen that yourself?

A. My statement to Mr. Arnell was not that I had not seen the structural steel plans. I believe you misinterpreted my answer.

(Testimony of Lorn E. Anderson.)

Q. I just wanted to know what it was. Have you seen those plans? A. Yes, sir.

Q. When did you first see them?

A. I couldn't answer on the date on that. I would imagine it was probably in August of 1950.

Q. Was that before or after you drew this particular plan that you have just testified about—No. BCG 8? A. About the same time.

Q. Now, I will ask you to examine that plan and see if there is any marquee in that plan at all?

A. No, sir, there is not.

Q. Well, then, you knew there was no marquee in the plan, didn't you, originally? [660]

A. In what plan?

Q. In the steel.

A. This does not represent all the steel that was on the job.

Q. Tell the jury what steel was on the job that is not mentioned in that plan.

A. There were pencil rods; there was webbing for the floor, or 6 by 6 mesh, whichever you want to call it—there is two items. I don't know just what all was on the job now—I don't remember.

Q. But the structural steel is all mentioned right there, and that's what the structural steel was made from, wasn't it?

A. I can't testify that that was all the structural steel on the job.

Q. And you were the architect on the job, and went ahead and ordered everything done, and didn't check the steel and the plans and specifications to

(Testimony of Lorn E. Anderson.)

see what you were doing when you joined the marquee on to that. Is that what you say?

A. I didn't state that.

Q. Well, you did know what the steel consisted of then, before you drew that plan, didn't you?

A. I know what steel was on that, yes, sir.

Q. You knew that was all the steel, outside of the pencil rods and for the webs, that was to go in the concrete, didn't you? A. I didn't say that.

Q. Well, was there any there?

A. Not that I remember at the present time. Those were merely samples that I gave as to other items that were on the job.

Q. I see. Then, so fas as you know, the steel that is mentioned in the regular Pacific Car and Foundry Company Plat of that steel here, is all the steel that was there, or all that was supposed to be there on the ground at that time, isn't it? A. No, sir.

Q. Well, now, tell the jury what else there was then.

A. There was pencil rods, mesh for the floors —those are two things I do remember.

Q. I asked you about that. I said exempting the pencil rods and the wire mesh. All the rest of the steel is described in this plat, isn't it?

A. I can't answer that.

Q. Can you read the plat?

A. I can read the plat, yes, sir.

Q. Look and see.

A. This doesn't tell me what was on the job, sir.

Q. But you drew the marquee plans, didn't you?

(Testimony of Lorn E. Anderson.)

A. Yes, sir.

Q. And you provided for steel beams in it, didn't you? [662]

A. Yes, sir.

Q. And Mr. Gothberg took the contract, and agreed to furnish all the material, and to do all work, and finish that job, save what steel was on the ground and what material was there, didn't he?

A. That is not the paragraph I read. It says the structural steel is on the site.

Q. Answer the question. You were supervising it, weren't you, for Mr. Carr at the time, weren't you?

A. At that time, yes, sir.

Q. And you know what the contract was, don't you? A. Yes, sir.

Q. You drew it? A. Yes, sir.

Q. Now, didn't Mr. Gothberg agree to use what material was there and to furnish all additional material under the terms of that contract—to finish that job according to the plans and specifications, which were made a part of the contract?

A. Mr. Gothberg agreed to that part of it, with the exception of the items as listed in the Special Conditions, as were to be furnished by the owner.

Q. All right. Now, show me those Special Conditions.

A. That is the one I just read to you, sir.

Q. Oh, and that one says nothing about the beam then, at all, [663] does it?

A. Not as such.

Court: Counselor, I think we have gone into this

(Testimony of Lorn E. Anderson.)

so thoroughly that the jury understands it without any further examination.

Q. I will ask you, then, if this contract—did you write this contract that has been introduced in evidence here?

A. I was responsible for its being written.

Q. And you know what's in it, don't you?

A. Generally, yes.

Q. All right. Will you read Article I of that contract?

A. "Article I. Scope of the Work—The contractor shall furnish all of the materials and perform all of the work shown on the drawings and described in the specification entitled "Construction of the Nash Garage" consisting of "Scope of Work, General Conditions, Special Conditions and Technical Provisions" prepared by Alaska Engineering Supply, acting as in these contract documents entitled "Engineer", and shall do everything required by this Agreement, the Scope of Work, the General Conditions, the Special Conditions, the Specifications and the Drawings."

Q. I hand you Plaintiff's Exhibit 7. I believe you testified to Mr. Arnell that you wrote that letter?

A. Yes, sir.

Q. What date does it bear? [664]

A. The 28th of December, 1950.

Q. Is that the date that you wrote the letter?

A. Yes, sir.

Q. And when did you deliver it to Mr. Gothberg?

(Testimony of Lorn E. Anderson.)

A. Shortly thereafter. I wouldn't know the exact date.

Q. Then immediately following that letter, those changes were made, were they?

A. No, sir. Actually, some of these changes had been accomplished before the fact of this letter. At the time that some of these changes were required, Mr. Carr asked for this 8 by 8 foot overhead door —Mr. Carr asked that that be accomplished, and we told Mr. Gothberg that should be accomplished. We told him what to do and, in turn, asked him for his proposal on it.

Q. Did you ever get his proposal?

A. I don't believe so. I am not certain of my memory on that.

Q. Do you know when that door was put there?

A. I believe sometime in November. I am not sure of the date on that.

Q. But you are sure it was prior to the time you wrote that letter?

A. Yes, I am sure it was prior to the time I wrote the letter.

Q. All right. Take the second one there. Is that the first one, the 8 by 8 door, the first Article?

A. Yes. [665]

Q. Take the second.

A. "Remove the northwest 3'0" by 6'8" door in the northeast wall and reinstall a 4'6" by 7' plate glass window in its stead."

Q. Do you know when that work was done?

(Testimony of Lorn E. Anderson.)

A. The exact date when this work was done—I don't believe it was before this time.

Q. You believe it was done before the letter was written? A. Yes, sir.

Q. All right. What's the third item on there?

A. Installing a reinforced concrete slab over the stairwell for the compressor.

Q. Now, when was that put in?

A. That was put in after this letter. I don't believe they put in a concrete slab, as I remember. I believe a wood floor was put in later on. I don't know what the agreement was.

Q. You don't think that concrete slab was ever put in there?

A. A wide platform was put in in lieu of the concrete slab. That is the same type of platform that that compressor is sitting on at the present time.

Q. Wasn't that slab—the concrete floor——

A. No, sir.

Q. I see. Something else that you ordered there?

A. Yes, sir. [666]

Q. All right. You don't think that was ever put in?

A. There was a support put in for the compressor. I don't remember whether it is a concrete slab, or whether it is a wood platform.

Q. I see. Now, what's the next one—Number IV?

A. "Move the fuel pumps to a position sixteen inches from the face of the northeast wall."

Q. Do you know when they were moved?

A. They were moved several times.

(Testimony of Lorn E. Anderson.)

Q. How many times?

A. Well, I can vouch for at least two moves that were made. Those two—I shouldn't say two moves—I should say two different orders for moving. This one—order for moving those pumps—they are not in this location at the present time, therefore, they must have been moved again.

Q. Now, did you mean by that order, for them to be moved later, or had they already been moved when you wrote that letter?

A. Well, they never were put in this position.

Q. They never were put in that place, were they?

A. No, they were moved to an entirely different position at a later date.

Q. Why did you tell Mr. Arnell that that particular move was an extra this morning?

A. If this move had been accomplished, it would have been an extra. [667]

Q. But it was not done?

A. Not putting it in this exact position. They moved it to another location, though.

Q. Do you know when they moved it to another location?

A. I don't know.

Q. Did you ever issue any other order to move it?

A. No, sir, I did not. I wasn't an employee of Mr. Carr for the full construction of the garage.

Q. You received pay for doing the whole job, though, did you not?

A. No, sir. I did not.

(Testimony of Lorn E. Anderson.)

Q. He paid you the full time you asked, though, didn't he?

A. He did.

Q. And that was $2,725.00, wasn't it?

A. I believe there is another check on it, sir. I believe there was a previous payment on the first part. I don't know whether that one check was all or not.

Q. Can you tell us about how much the other check was?

A. I don't remember. It seems to me it was $104.00, but I wouldn't vouch for that being correct.

Q. Did you ever go on this job during the daytime, when the work was going on?

A. Yes, sir.

Q. Did you ever see Mr. Carr there on the job?

A. I believe I did. [668]

Q. Did you ever talk to him there—speak to him? A. Yes, sir.

Q. When was that?

A. I couldn't vouch for the date on that. I saw him during that period a number of times. I saw him at his other establishment, and I saw him at home, and I saw him on the grounds, but I couldn't vouch just when I had seen him at any one of the places, nor what was said at any specific meeting.

Q. What is the next item?

A. "Install a two-plunger hoist in lieu of the one-plunger hoist shown."

Q. Now, show me the one-plunger hoist on the

(Testimony of Lorn E. Anderson.)

plans—show me where it is. I don't know which one it is. Is it this one or——

A. There are two hoists shown.

Q. Show me where it says a one-plunger hoist.

A. It doesn't actually say a one-plunger hoist.

Q. It is not shown in the plans and specifications as a one-plunger hoist at all?

A. It is not shown as a one-plunger hoist in the specifications.

Q. Did you ever see that exhibit there that is marked Defendant's Exhibit No. J—did you ever see that?

A. I don't believe so. [669]

Q. Did you ever see one similar to it?

A. I have seen descriptive literature on this rotary hoist.

Q. Did you see Mr. Carr's hoist when it came and was unloaded?

A. Yes, I saw the hoist when it arrived on the job.

Q. And do you know when that hoist was ordered? A. No, sir, I don't.

Q. It was ordered before you drew the plans, wasn't it?

A. I don't know.

Q. It was a two-plunger hoist, exactly like the picture on the face, wasn't it?

Mr. Arnell: Mr. Bell, would you move back down here, please?

Mr. Bell: I want to show him this.

A. It was approximately like that.

(Testimony of Lorn E. Anderson.)

Mr. Bell: I am not in the habit of letting you order me around. If the Judge says so, I will.

Court: Counsel shouldn't ask any other counsel to do anything.

Mr. Arnell: I realize that, your Honor.

Court: Counsel should apply to the Court. It is bad enough to have one boss without having more than one.

Q. Now, why did you write that letter to Mr. Gothberg?

A. I wrote this letter actually at Mr. Gothberg's request.

Q. And where were you when he requested this? Where were you standing or where were you sitting when he requested that? [670]

A. I don't remember.

Q. Were you at work out on the base?

A. No, sir.

Q. Where did you write that letter?

A. At my home.

Q. And where is your home, or where was it at that time?

A. At this time it was 212 East 6th Avenue.

Q. In the town of Anchorage?

A. Yes, sir.

Q. That was when you wrote that letter?

A. Yes, sir.

Q. Then you knew, when you wrote that letter, that most of that work had already been put in, did you?

A. Yes, sir.

(Testimony of Lorn E. Anderson.)

Q. Can you tell the jury why the letter was written?

A. Mr. Gothberg had been given verbal instructions to do several items. He requested a letter, or a statement in writing, setting out exactly what he had been requested to do.

Q. Who had requested him to do those items?

A. Either myself or Mr. Smith.

Q. And did you know whether Mr. Smith had instructed him to do any one of those particular things or not?

A. I wouldn't say which ones I had instructed, or which ones Mr. Smith had instructed. [671]

Q. Did you give him that letter so that he might use it to sue Mr. Carr for extras?

Mr. Arnell: If your Honor please, I believe this is going far beyond the scope of cross examination.

Court: Overruled.

A. No.

Q. Now, you have testified about a change in wiring on the hoist. I believe you meant framing on the hoist, did you not?

A. If I got it wiring, maybe I am wrong.

Q. You testified to Mr. Arnell, as an extra, the change in this hoist. Now, how much money did you say this morning was due Mr. Gothberg for changing of that hoist from the two-plunger to the one-plunger, or reverse. How much did you say was due on that?

A. I didn't say what was due. I said that the

(Testimony of Lorn E. Anderson.)

price shown on the other exhibit was approximately correct.

Q. Do you know what that price was?

A. As I remember, it was about $500.00.

Q. $500.00 for changing the connection from a one to a two-plunger hoist?

A. No, that wasn't for changing the connection from one-plunger to two-plungers. It was for installing an extra line. Also, there's another hoist shown that Mr. Gothberg had to make provisions for. It was also necessary—the [672] necessary connections for that was actually two holes had to be dug out to put in concrete for it, to put in the walls around, and so on.

Q. You say you never did designate any specific one on the plans, a one-plunger or two plunger hoist?

A. May I see the specifications, sir?

Q. I will get them again for you.

A. It doesn't specifically state a one-plunger or two-plunger hoist in the specifications or plans.

Q. Then the only thing you know about it is that you did see the hoist?

A. No, sir. All I know about it is Mr. Gothberg gave Mr. Smith and myself some descriptive literature on the hoist, and it had an item marked on it.

Q. Now, you drew the plans showing two hoists exactly alike, didn't you? Would you look at those plans and see if you did?

A. That is correct.

Q. Did you make any showing whether it was to be a one-plunger or two-plunger hoist?

(Testimony of Lorn E. Anderson.)

A. No, we did not.

Q. Why did you tell the jury that this is an extra then?

A. Because the information furnished us—the descriptive literature given to the contractor indicated a one-plunger hoist. Therefore, if a two-plunger hoist was to be installed, [673] it would be an extra. That was an item furnished by the owner, and, in turn, the descriptive literature would be illustrative of what he was supposed to furnish.

Q. Why didn't you make some notation of it someway or another, either in the drawings or in the specifications?

A. Because I am not infallible. I do make mistakes.

Q. Oh, I see. That is your only explanation of it then—you are not infallible and you do make mistakes?

A. Well, all humans are. And we also tell the owner on any job we design there should be a percentage set aside for extras, because we know some errors will occur, and there will have to be corrections as extras.

Q. Do you know in regard to the second hoist, whether there were any holes made for the actual installing of another hoist? A. Yes, sir.

Q. Did you see them yourself?

A. Yes, sir.

Q. When did you see them?

A. I wouldn't testify exactly to the time; however, there is a pad down there in the floor right

(Testimony of Lorn E. Anderson.)

now, that can be seen, that makes provisions for that hoist—a separate section of the floor so they can put in the other hoist without tearing out the floors.

Q. A place where they can tear out and put in the second hoist? [674]

A. Mr. Gothberg didn't have a second hoist. He couldn't put it in.

Q. Just who did you represent all through this deal—Mr. Gothberg, or did you represent Mr. Carr?

A. An engineer——

Q. Who did you represent?

A. All right. As an engineer myself, I am to represent the owner, but, in turn, on a job like this, an engineer is more or less of an arbitrator, which I performed between the owner and the contractor.

Q. You have heard other engineers testify in this case, haven't you? A. Yes, sir.

Q. And they testified that they would not accept a floor in the condition that this is in. Did you see this floor before you accepted it?

A. I did not accept that floor. I was not in Mr. Carr's employ at the time the floor was poured.

Q. Why do you state you were not in his employ?

A. Mr. Carr had hired me to do this job, and in turn he asked us to do the inspection work on it. During the period of inspection work on it, Mr. Carr called me on the phone one night and talked to me awhile and he was—I don't remember the whole situation. I do remember that we did talk some-

(Testimony of Lorn E. Anderson.)

thing about the plans for the finish work in the show room, [675] and Mr. Carr wasn't satisfied with the speed with which we were getting out the plans, and, in turn, I told him that I would no longer be considered in his employ.

Q. What date was that?

A. I wouldn't state the exact date. I would say that it was near the end of January. Probably, oh, around the 20th on to the 31st of January, sometime in that period.

Q. You already had your money in November, had you not? A. Money for what, now?

Q. Whatever money you drew. You had had the last pay check of $2,725.00 in November, hadn't you?

A. We had a pay check for approximately that amount. Some $2,700.00 in November, which was payment for the plans and specs which had been due us on the date that the contract was let.

Q. Then you charged Mr. Carr and Mrs. Carr, or whoever it was—Mr. Carr, I think you said—$100.00 and some odd dollars, and then $2,725.00, just for drawing those ten plans and drawing the specifications, is that true? A. Yes, sir.

Q. Or did that include the engineering fee for inspection of the work?

A. It did not include the engineering fee for inspection. I believe, if you will go back to the letter that was written to Mr. Carr, as a bill for that, it was stated in [676] that letter.

Q. Do you have a copy of it?

A. I don't have it here, no, sir.

(Testimony of Lorn E. Anderson.)

Q. Then you did not feel that after he called you that time, that you were any longer responsible to Mr. Carr in the carrying out of this contract and specifications? A. No, sir, I did not.

Q. Did you tell him you were quitting then?

A. Yes, sir.

Q. Was the argument over the fact that he was mad because you wouldn't get on the job and wouldn't go there and see about it?

A. No, sir, it wasn't.

Q. You say it was because the plans and specifications were late, is that right?

A. Mr. Carr wanted some additional design work done on the finish work in the show room, and he wasn't satisfied with the speed with which we were getting them out.

Q. And you had already given him all of these plans long before, hadn't you?

A. Yes, sir.

Q. In that conversation, was the floor mentioned?

A. Not that I remember.

Q. Do you know whether or not the floor was in at that time?

A. I believe not. [677]

Q. You think it wasn't in?

A. That's right.

Q. And that was in January or February?

A. Near the end of January, I believe.

Mr. Bell: That is all.

Court: Is there any further direct examination?

(Testimony of Lorn E. Anderson.)

Redirect Examination

Q. (By Mr. Arnell): Mr. Anderson, in regard to BCG 8, which is the plan of the marquee, would all of the items designated on that plat be regarded as structural steel? I mean all of the items—would they be determined structural steel, or something else?

A. No, there is a design here of a railing at the boiler room stairs which is certainly not structural steel.

Q. What would these beams be classified as?

A. Structural steel.

Q. Mr. Bell has asked you about the hoist. Do you have the original specifications there?

A. Yes, sir.

Q. I would like to direct your attention to Special Conditions, Page SC-2, Item E.

A. Yes.

Q. What does that item refer to? Would you read it?

A. Paragraph SC-2, sub-paragraph E: "One rotary car lift is [678] to be installed and provisions made for the future installation of a second."

Q. Now, is the hoist that is installed down there now, a rotary hoist?

A. I believe it is. I haven't checked the name on the hoist.

Q. I am referring to the trade name, Mr. Anderson. I am referring to the type of hoist.

A. Rotary hoist is a trade name.

Q. I realize that, but when you wrote these spe-

(Testimony of Lorn E. Anderson.)

cifications, did you mean to imply that that was the kind of hoist to be used there, or did the word "rotary" have another significance?

A. No, the rotary here is that trade name.

Q. Was there, at the time, a definite selection of a two-plunger hoist as distinguished from a one-plunger, at the time the contract and plans and specifications were approved by both parties?

A. At the time the contract was signed?

Q. Yes.

A. No, there wasn't a final selection that I know of. Mr. Carr had indicated a one-plunger hoist was the type to be furnished.

Q. Do you recall any discussions with Mr. Gothberg regarding the type of hoist that was to be installed, as distinguished from the trade name of a hoist? [679] A. No, I don't.

Q. Did Mr. Gothberg ever call you up by telephone and ask you for this item that you can recall?

A. Not that I recall.

Q. Now, to go back to the structural steel just a moment, Mr. Anderson, was there any representation to the contractor that all of the structural steel was on the site?

A. No, other than what's in the specifications.

Q. To your knowledge, were the plans which are in evidence here, the only plans that were made available to him?

A. The only thing you would classify as plans. There was some descriptive literature made available to him at a later date, such as descriptive

(Testimony of Lorn E. Anderson.)
literature on the washmobile—also, there's descriptive literature on the hoist.

Mr. Arnell: That's all.

Court: Is there any further cross examination?

Mr. Bell: That's all.

Miss Wise: Was that the plan that was submitted to the sub-contractor?

Mr. Anderson: I cannot answer that. The prime contractor gave the plans to the sub and I don't know what he gave to the sub.

Miss Wise: Were all those plans drawn up at the same time?

Mr. Anderson: Approximately the same time. I don't believe [680] they are all dated the same. They run from July 5th, 1950, to August 27, 1950. They were drawn over a period of time.

Court: That is all. Another witness may be called. No, the court will stand in recess and the jury will remember the admonitions of the Court as to duty, and the recess will be for 10 minutes.

Whereupon the court at 2:42 o'clock, p.m., recessed until 2:55 o'clock, p.m., at which time the following proceedings were had:

Court: The record, without objection, will show all members of the jury present.

Mr. Bell: I am working on some instructions that I want to offer, but we have been so doggone busy—excuse that slang—that I just haven't got them done, but I wonder if we get them done tonight, if it would be too late to submit them to you?

Court: You can submit them up to the time the case goes to the jury.

Mr. Bell: I am very anxious for you to give these. This one, I will tell you now, while Mr. Arnell is here, and I hope you will give it—maybe you have covered it—the defendants take the position that the plaintiff cannot recover on the contract since it has not been performed, and a suit filed on the contract is prematurely filed.

Court: I won't give that so far as I know now. I am [681] going to say that substantial performance is sufficient. Even if it has not been fully performed, the fact that there are some small items not performed, I think that would not preclude the plaintiffs. If you have some authority, I want it. We can't finish the case today, and I will look it up over the week end, so when we come back Monday afternoon—it will have to be—I have a hearing on annexation set for Monday morning, and I suppose there will be 50 people here, and I will have to suspend until Monday afternoon, if we don't finish tonight.

Mr. Arnell: So far as we are concerned, I think that our testimony will take only another 15 or 20 minutes.

Court: You have surrebuttal?

Mr. Bell: Very little. I think Mr. Carr.

Court: You can go ahead and argue this afternoon, but I will have to quit at 4:30 to take up some criminal matters. It is now three minutes of 3:00, so I don't see how you can cover your arguments, so I think, to do justice to your clients, I won't put

any limitation on it. You are experienced lawyers and know if you talk too long you defeat your purpose, but there is so much detail, it will be hard to argue the case.

Mr. Bell: I will work on that question tonight. I believe I am right, Judge, because I had that instruction given once. I offer that instruction, and I think I have a copy of it in my files. It was in an Oklahoma court.

Court: I am going to put the case to the jury and let the [682] jury render a verdict, and if the verdict should go against you, a motion to set for a new trial, or—we can do the same thing. If we should quit now, we have wasted all this time, provided you are right. I will put it to the jury anyway.

Mr. Arnell: I would be willing to have argument limited if the Court desires it. I don't like to limit it in a case of this kind, when there is so much detail, but I might limit it to an hour and a half. Would that be all right.

Mr. Bell: I think an hour and ten minutes to the side would give us good coverage. Do you, Ed? If you don't, I will consent. You be the judge.

Court: A witness may be called.

Mr. Arnell: Call Mr. Gothberg.

Mr. Bell: Before he takes the stand, Ed—I showed you this copy for you to inspect, and I believe I overlooked offering it.

Court: Is Mr. Anderson here?

Mr. Bell: He said he had seen it. Do you have any objection to its introduction?

Mr. Arnell: I do, your Honor, for the simple reason that it is not part of the contract, or the plans, or the specifications.

Mr. Bell: It is a structural steel drawing. Would your Honor like to look at it?

Court: I should sustain an objection to it at this time—— [683]

Mr. Bell: All right, your Honor. I will reoffer it.

Court: ——with the provision of its being reoffered if it seems it should be admitted.

Whereupon

VICTOR F. GOTHBERG

was called as a witness on his own behalf, and testified as follows:

Direct Examination

Q. (By Mr. Arnell): Mr. Gothberg, at what percentage of stage of completion was the building when Mr. Carr moved in?

A. About 99%—a little better.

Q. Then all that remained, virtually, was finish work on the outside and patch work, and that sort of thing, was it?

A. No, there was a little left in the office and the show room.

Q. When you say there was a little left, what was done, then, in the office and the show room after Mr. Carr moved in?

A. I don't recall exactly what was done, but I had two men there five days. They worked five days after he moved in and then it was finished.

(Testimony of Victor F. Gothberg.)

Court: What per cent of completion, did you say?

Mr. Gothberg: 99% or a little better.

Q. If you recall, Mr. Gothberg, state when the concrete floor was poured, in relation to the time Mr. Carr took possession, or asked for occupancy of the building?

A. I believe the floor was in just about three weeks before [684] he moved in.

Q. Had he asked you to expedite the job at this time, so that he could have occupancy?

A. He did.

Q. Was he down there at the time that concrete floor was being finished?

A. I don't remember if he was down there that day, but he came in the morning and still the concrete wasn't set.

Q. At that time did he make any objection to the condition of the concrete?

A. There was two places there was trowel spots, and he made objections to those two places.

Q. Where were those two places?

A. One was just opposite the big 12 by 12 door, and one was a little further north.

Q. What did you do as a result of this objection by Mr. Carr?

A. I went out and got the cement finisher that did the job, and got him before the concrete set, and he repaired those two spots.

Q. Who did that work?

A. His name is Mr. Nardici.

(Testimony of Victor F. Gothberg.)

Q. Was Mr. Carr there at the time these two places were fixed? A. He was there then, yes.

Q. Did you have any subsequent discussion with Mr. Carr, then, in relation to the floor? [685]

A. I had, and I asked him if it was O.K. after it was fixed, and his answer that he believed that's O.K. now.

Q. Was anything more done by you, at his request, with regard to the concrete floor?

A. No, there was nothing more done.

Q. Well then, he moved in, did he not?

A. Right.

Q. Mr. Gothberg, how long have you been in the contracting business here in Alaska?

A. Here in Alaska I've been since 1945.

Q. And were you in the contracting business prior to that time?

A. I started the contracting business in Chicago in 1925, as a general contractor.

Q. Are you familiar, Mr. Gothberg, with the customs and common usages that are recognized in the contract trade, where an owner occupies a building that is in process of construction or being finished? A. I certainly am.

Q. Will you explain those to the jury, please?

Mr. Bell: Your Honor, that is incompetent, irrelevant, and immaterial, and the witness is not shown competent to experience an opinion. That is purely an opinion asked for.

Court: I think the practices could not be binding upon the defendant unless it is shown that the de-

(Testimony of Victor F. Gothberg.)

fendant had knowledge [686] of the practice. To say that contractors have a practice is not sufficient, and the objection is sustained.

Q. Mr. Gothberg, did you have any discussion with Mr. Carr regarding your relative positions if he accepted the building?

A. I really didn't have at the time, but when he moved in, it is the same thing——

Mr. Bell: Object to him going further and attempting to say what the custom is.

A. That is not the custom. It's the law.

Mr. Bell: Object to him making a speech.

Court: If you had any conversation with him on the subject, you may repeat it. Otherwise——

A. Not that I recall.

Court: That is the answer then.

Q. Mr. Gothberg, I hand you Defendant's Exhibit J, and ask you whether or not you have seen that exhibit before, or a similar document?

A. I saw this at the time the hoist was delivered to the job. That is the first time I ever saw it.

Q. Prior to the time the hoist was delivered to the job, had you received any literature different from this?

A. There was some literature that showed a one-plunger hoist on it.

Q. Had you discussed the type of hoist with Mr. Carr, and also [687] his engineer, Mr. Anderson?

Mr. Bell: Object. This is repetition. This was gone into before by this witness.

(Testimony of Victor F. Gothberg.)

Court: Yes, I think this was all covered on direct and cross examination of the witness. My recollection is that nothing was omitted.

Mr. Arnell: I believe there are no further questions, your Honor.

Court: Any cross examination?

Cross Examination

Q. (By Mr. Bell): Mr. Gothberg, when did Mr. Carr move in the place?

A. I couldn't state exactly the date, but his own statement was the 15th of February.

Q. Well, you think that was about right, don't you? A. I believe so, yes.

Q. Now, I will hand you Defendant's Exhibit No. 4, and ask you to read that top line right there.

A. "Complete to date—90%." It is dated 2-10-51—building to date—90%.

Q. That was 90% of what amount?

A. Of $31,000.00—a little over.

Q. And he paid you that statement that date, did he not, or a day or two later?

A. It was marked on there it was paid 2-25-51.

Q. That would be February 25th?

A. 25th.

Q. And he paid you according to the statement you served on him? A. Yes.

Q. And at that time you contended that the work was 90% done? A. Something like that.

Q. Now, did you ever figure what $34,605.00 is 90% of—what figure?

(Testimony of Victor F. Gothberg.)

A. Of $38,000.00—a little over.

Q. Well, then, at that time you contended that he owed you approximately 10% of the contract—10% of the balance due?

A. On the contract, yes.

Q. And you gave him this paper and he settled with you according to it?

A. No, the 10% has never been settled.

Q. I say he paid you this statement exactly as you billed him for $10,381.50, and he gave you a check for $10,381.50? A. Right.

Q. Which made 90% paid by three checks listed on your statement? A. Correct.

Q. Now, Mr. Gothberg, on that basement that you testified about—that Mr. Carr came in there and you say raised some objection to a couple of places in the concrete—that was [689] fresh concrete that day, wasn't it? A. Right.

Q. And those particular places were holes that were not even filled up, a couple or three inches deep, weren't they?

A. No, one hole, I believe, was half an inch deep—the biggest one.

Q. All they did was just dump some more concrete in it and level it off?

A. You know where concrete isn't set—you just have to rough it up a little and put concrete right on top.

Q. He called your attention to those two places as you were finishing up the pouring then?

(Testimony of Victor F. Gothberg.)

A. Right.

Q. And that is the only thing that was mentioned about the concrete floor at that time, wasn't it?

A. No, there was mention of the whole floor.

Q. You couldn't tell whether the floor was level —could you tell with the eye?

A. I could, because I had this water over, cleaning the floor. That's how I noticed there was two hollow places. If I didn't use water, I wouldn't notice it.

Q. Then you knew the condition of the floor that day? You had flooded it with water and knew the condition of it as of that date?

A. Right. [690]

Q. And it is still in that same condition today?

A. That I couldn't say.

Q. If it is out of level now, then it was out of level then?

A. Not necessarily, no—two years, you know, a floor can settle.

Q. Well, which is that—an eight inch or a six inch slab?

A. Six inch.

Q. And it isn't apt to settle very much?

A. Oh, yes.

Q. The one you built there is apt to settle?

A. Any slab.

Mr. Bell: That is all.

Court: That is all. Another witness may be called.

Mr. Arnell: We have no further evidence, your Honor.

Court: Is there any surrebuttal?

Mr. Bell: Yes, your Honor, we want to put Mr. Carr back on the stand.

Court: Very well.

Whereupon

BURTON E. CARR

resumed the stand on behalf of the defendants, and testified as follows:

Direct Examination

Q. (By Mr. Bell): Mr. Carr, you heard this man, Anderson, who was a witness here, testify that you gave him some literature on a hoist, that was a one-plunger hoist. Did you do that? [691]

A. Not on the one-plunger hoist—a two-plunger hoist.

Q. Is that the only literature you ever had or considered was a two-plunger hoist?

A. That is the latest equipment. They haven't had a one-plunger hoist for the last ten or fifteen years. I never seen one installed. A two-plunger hoist is the latest equipment.

Q. When did you order that two-plunger hoist?

A. It was ordered before he started in making the plans.

Q. Now, in regard to a plan for structural steel, that I had here a few moments ago. I will ask you to examine this plan and state whether or not that

(Testimony of Burton E. Carr.)

was shown to Mr. Anderson before the plans were ever drawn? A. Yes, this is the plan.

Q. Was that before you and Mr. Anderson and Mr. Smith on more than one occasion before the plans were drawn?

A. Oh, yes. He had a copy of this, the same plan —the identical same plan.

Q. Has there been any change in that at all?

A. No change at all.

Q. Do you know whether Mr. Gothberg saw that plan or not?

A. I couldn't say for sure if he saw it, because this steel company that designed this plan and Mr. Gothberg hired him to assemble it.

Q. The same company to assemble it that had made the plans? [692]

A. Yes, and that I bought the steel from.

Mr. Bell: We offer the plan in evidence.

Mr. Arnell: We wish to renew our objection on the grounds that it is incompetent. There is no showing Mr. Gothberg ever saw it, or that it was a part of any plans upon which he based his bid.

Court: The objection is sustained.

Mr. Bell: Exception, your Honor.

Court: The exception is noted. I think the ruling was erroneous. It was shown to Mr. Anderson, and he knew about it when he drew the plans and specifications, and it may conceivably have some value. The objection is overruled, and it may be admitted.

Clerk: Defendant's Exhibit T.

Q. Mr. Carr, I hand you Defendant's Exhibit T,

(Testimony of Burton E. Carr.)

which is the structural steel plan, and ask you to look at it and state to the jury whether or not, in that plan, there was ever any marquee shown in the drawing at all?

A. No, this plan didn't include a marquee for the front.

Q. Now, then, when Mr. Anderson was drawing the plans for your building, did he put a marquee in to fit to that steel drawing?

A. That's right—the first marquee—I had a marquee there that was according to this Nash plan, I believe. That's right over here—a pencil copy, because the City lost the original [693] of the plan, so I made a copy of it—a pencil copy, just as I remembered it.

Q. I will show you this pencil plan and ask you who drew that?

A. This one I drew myself. This is the plan that I showed Mr. Anderson and Mr. Smith, and this is the one that I give them an idea of the scope of the work, and he was to take the plan and make any changes to beautify the building, and give us more floor space and all, and I was going to have this marquee cut off square with a post in the center. He said it would look better if it was a rounded effect, so he decided on the rounding effect.

Q. Does your plan before you, that was penciled by you, have a post at the outer corner of the marquee?

(Testimony of Burton E. Carr.)

A. Yes, I have it marked for a post here.

Q. Then, was that particular plan, along with the steel plans, before Mr. Anderson before and during the time that the plans and specifications were being drawn?

Mr. Arnell: I would like, for the record, to interpose an objection on the grounds that this evidence is incompetent.

Court: The objection is sustained.

Q. Do you remember whether or not Mr. Anderson was shown that particular plan?

A. He was, because these are his pencil marks on here. It is his own writing right along here. He penciled it off, and this is where he got the idea of practically what I wanted. [694]

Q. Is there a marquee drawn on that plan with a pencil, that was drawn by him?

Mr. Arnell: If your Honor please, I wish to renew my objection again.

Court: The objection is sustained.

Mr. Bell: Your Honor, I seldom ever fuss about anything you do, because I think you are so right most of the time, but the reason I am offering this, your Honor, is to contradict the evidence of Mr. Anderson, who testified he had never seen that plan. Now, I am asking my witness what marks on it that he did.

Court: All right. The objection is overruled. You may answer. Is there anything to identify that the drawing was shown to Mr. Anderson?

Mr. Carr: Yes. He made his own marking on it.

(Testimony of Burton E. Carr.)

Mr. Arnell: I think, your Honor, my objection is still good. Mr. Bell can ask him a direct question, whether or not a certain fact existed, but this continuous reference to another plan that is not even in evidence, I think is wrong.

Court: Mr. Anderson was asked about some plan—whether his writing appeared upon it, or whether Mr. Smith's, and he said no, he had never seen it before. Assuming it is the same paper——

Mr. Bell: I will ask him.

Q. Mr. Carr, were you present in the courtroom when Mr. Anderson [695] was shown that particular plan that you have before you?

A. Yes, I was.

Q. Did you give it to me to take up to show it to him?

A. Yes, I did.

Q. Is it in the same condition now that it was when Mr. Anderson examined it?

A. Identical condition.

Court: The same paper?

Mr. Carr: The same paper.

Court: The objection is overruled.

Q. Was there a pencil mark drawn diagonally across the corner where the marquee was later placed? A. Yes.

Q. And who drew that line across the corner?

A. I drew this line across the corner myself.

Q. Who was present when you drew it across?

A. Mr. Anderson was present when I drew it across.

(Testimony of Burton E. Carr.)

Q. What was your purpose for drawing it across?

A. I told him I wanted a post on the outside of the building to hold up the marquee, and he said he could design it without a post, by putting some steel in, so I just drew the mark across there to show where the gasoline alley was.

Q. Now, Mr. Carr, how many times were the pumps moved?

A. One time.

Q. Do you have the permit that was issued for the moving of [696] those pumps?

A. Yes, I do.

Q. I will ask you if this is the permit that was issued by the City of Anchorage for the moving of the pumps? A. Yes, it is.

Mr. Bell: I offer it in evidence.

Mr. Arnell: We have no objection, your Honor.

Court: It may be admitted and marked appropriately as Defendant's Exhibit U, and may be read.

Mr. Bell then read Defendant's Exhibit U to the jury.

Q. Mr. Carr, you heard Mr. Gothberg say that you said that the floor was all right after he patched those two big holes, when it was being poured there. Did you tell him that?

A. I saw the two large holes there, and I went after him right away to have those patched, and he patched them.

Q. Could you tell anything about whether the floor was level or drained at that time?

(Testimony of Burton E. Carr.)

A. No, because we didn't walk on it. It was too green to walk on it.

Q. Did he put any water on it, in your presence, to see if it was level or not?

A. I never saw any water on it.

Q. Did you ever, at any time, either to Mr. Gothberg or Mr. Anderson, accept that job and say it was all right at any [697] time?

A. No, I didn't.

Q. Mr. Anderson testified that you fired him sometime. Did you do that?

A. No, I didn't.

Q. Was there a conversation had between you and Mr. Anderson about him supervising and inspecting the job?

A. Well, it was supervising, also, but there wasn't much said about that. The main thing was the fire wall. He didn't finish the plan for the construction, if it was to be block or wood, so Gothberg wanted that plan so he could go ahead and put in that wall. So I called Anderson up several times and he said they would have it ready and I told him I was very anxious to get that done, and he promised to have it ready. He said he hadn't started on it, and I told him if he didn't get it by the next day I was going to sue him. Then he slammed up the receiver, and that was all there was to it, but all the floor was in.

Q. Was there ever a conversation between you and him before you paid him the check of $2,725.00, about what he would do, or he and his partner,

(Testimony of Burton E. Carr.)

Smith, would do, if you would pay him this money?

Mr. Arnell: If your Honor please, I would like to interpose an objection here. This has all been gone into on direct examination. [698]

Court: The objection is sustained. It's all been covered thoroughly on direct and cross examination in the main case.

Q. Did you ever see Mr. Anderson or Mr. Smith on the job during the working hours, when that building was being constructed?

Mr. Arnell: That is another repetition. The witness has already testified to that.

Court: The objection is sustained.

Mr. Bell: I would like to make an offer.

(Counsel and Reporter approached the bench.)

Mr. Bell: Mr. Anderson had testified in this case long after Mr. Carr had left the stand, that he had been to the building and inspected it many times, and that he was not to make inspections. He did not agree to make inspections regularly of the building, and the proposition I am asking him about took place in Mr. Carr's home the night that he paid him the $2,725.00, which was sometime in November of 1950, and at that time, if you will permit this witness to testify, he will testify that Mr. Anderson told him that he or Mr. Smith would be on the works every day and he would have a paid engineer on the job every day during the construction of the work, and I offer to prove that by this witness, to contradict the statement of Mr. Anderson, who testified since Mr. Carr was on the stand.

(Testimony of Burton E. Carr.)

Mr. Arnell: If your Honor please, the basis of my objection is that it is erroneous. I think the evidence which Mr. Carr has already testified to and brought out, is to the effect that Mr. Anderson did not have any authority whatsoever to represent him on this job because he had been paid in full.

Court: The objection is sustained on one ground. It is repetition in any event, and it should have been brought out before Mr. Anderson testified.

Mr. Bell: I am offering this to show that I had no idea. I couldn't anticipate that Mr. Anderson would testify that he did supervise this job, or I had no way of suspecting even that he would testify to such a thing. Therefore, to do it now, after I did lay the foundation by asking Mr. Anderson if he didn't agree to this while he was on the stand —and he said he did not—therefore, I thought it was proper to have this witness testify that Mr. Anderson did agree to this at the time the $2,725.00 was paid.

Court: As I recall, Mr. Carr was examined and cross examined thoroughly upon this point, as to what he said to Mr. Anderson and what Anderson said to him, and what Anderson's authority was, and I took it that Mr. Anderson's testimony was simply an answer to what Mr. Carr had said. To permit Mr. Carr to go into this, Mr. Arnell can call Mr. Anderson back and it could go on all night —I just don't see. The objection is sustained. [700]

Mr. Bell: Exception.

(Testimony of Burton E. Carr.)

(Counsel and Reporter stepped down from bench.)

Q. Has there been any work done on this building in the way of finishing it since the pumps were moved by Mr. Gothberg?

A. Only except as I testified before. He had a carpenter come in there and tried to make the doors work.

Q. Approximately what date was that?

A. That was several times. He had carpenters in there to try to get the doors to open and close so we could get in and out of the offices.

Q. Was that this year or last year?

A. That was this spring.

Q. This spring?

A. Yes.

Mr. Bell: I think that's all.

Court: Counsel for plaintiff may examine.

Cross Examination

Q. (By Mr. Arnell): Did I understand you to testify to the effect, Mr. Carr, that Exhibit T, which you have before you there, which is the layout of the steel framework of the building, was shown to Mr. Gothberg at any time prior to the time this contract was signed?

A. I naturally assume anybody takes a contract for that much money—that was to install the steel and put it in place, [701] but Mr. Gothberg would have to read the specifications to make a bid on it. He wouldn't just make a bid.

(Testimony of Burton E. Carr.)

Q. Where has that plan been ever since you showed it to Mr. Anderson?

A. This one has been in my possession, and he had one, also. The plan that he has—Mr. Anderson and Mr. Smith—we went over to Marion Smith, that is the man that put in the first foundation, and he give us the plan identical like this. Then he give us one plan of the original foundation that this other Mr. Smith, the architect, drew; then the City lost the original plan and I drew this from memory from the original plans that the City lost.

Q. Now, will you answer my question and state whether or not you know that Mr. Gothberg saw those plans?

A. I couldn't say if he had seen them or not. The only thing I know, he would have to see them to bid on the building.

Q. If they were in your possession, how could he see them?

A. I got this set of plans afterwards. I got this set of plans from the Steel Fabrication down there on Railroad Avenue. This is an extra set, identical —the same plan.

Q. Well, if Mr. Gothberg was required to furnish any steel, why did not that plan go into the basic plans and specifications that were eventually approved by both of you?

A. This is the only plan I have and I borrowed this. This belongs to this structural steel company. [702]

Q. When did you borrow it?

(Testimony of Burton E. Carr.)

A. I borrowed it several months ago.

Q. At the time the contract was signed, or just recently?

A. I borrowed it several months ago—I believe it was several months ago, I couldn't say. It was the time that the structural steel was being assembled.

Mr. Arnell: Your Honor, at this time I would move that the exhibit be stricken from the record. There has been no identification or showing, at least so far as Mr. Gothberg is concerned, that that document was ever brought to his attention or was known to exist.

Court: I think there is sufficient showing to admit it. This is Defendant's Exhibit T, ladies and gentlemen, and it is a blueprint which appears to show the plans, or drawings, of the structural steel of the building, without the marquee. It has been admitted in evidence. At first I thought it should not go in, then it seemed that it might conceivably have some bearing upon it, because Mr. Anderson said he had this when he made the plans and specifications, but you should remember specifically that there is no proof that Mr. Gothberg, the plaintiff, ever saw this plan at all—no proof that he ever saw it. Mr. Carr thinks he must have seen it before he made the bid, which is a matter of argument to you. Mr. Gothberg said he didn't see it and there is no proof he did, but it was shown to Anderson. Now, if you think it is of any consequence, by reason of the fact that [703] it was shown to Mr. Anderson,

(Testimony of Burton E. Carr.)

it is your job to decide what bearing it has on the case. The motion is denied.

Mr. Arnell: Since this is an entirely new matter, your Honor, may I call Mr. Gothberg when this witness is released?

Court: He testified he didn't, did he not?

Mr. Arnell: He hadn't had an opportunity. I don't think I asked him that question.

Court: All right. He may testify on that one point. I withdraw my statement that Mr. Gothberg testified he had not seen it.

Mr. Arnell: I have no further questions, Mr. Carr.

Mr. Bell: That's all.

Court: This is a bit out of order, but Mr. Gothberg may be called on rebuttal to testify on this one point, and no other.

Whereupon Mr. Carr left the witness stand and

VICTOR F. GOTHBERG

was called as a witness in his own behalf, and testified as follows:

Direct Examination

Q. (By Mr. Arnell): Mr. Gothberg, you have been handed Defendant's Exhibit T, which is the plan, or sketch, of the proposed steel framework of the building. I now ask you whether or not you have ever seen this plan before?

A. I never seen that before that was shown to Mr. Anderson this morning. [704]

(Testimony of Victor F. Gothberg.)

Q. Did Mr. Anderson ever exhibit any such plans to you at any time? A. No.

Q. Are the plans that are in evidence here the only ones you ever saw——

A. This is the first time I ever seen this today.

Q. Will you explain to the jury, Mr. Gothberg, upon what basis you bid this contract so far as the steel is concerned?

Court: I don't think we ought to go into that. It is too late. He can testify he never saw this paper.

Mr. Arnell: That is all.

Cross Examination

Q. (By Mr. Bell): Mr. Gothberg, you did agree and contract in the contract and specifications to place that steel, didn't you?

A. I did, yes.

Q. And you did place the steel, didn't you?

A. Yes, the steel company placed it for me.

Q. Now, how did you know what you were bidding on, and how much steel you were to handle if you didn't have a similar plan to that one?

A. I called the steel company. I didn't know how many pounds there was so I called them up and asked them. I know the price is 5c a pound for setting steel, and I asked them if they had seen the plan. I said I don't know how much there [705] is—I haven't seen the plans, and he said I will figure it for you, and he give me a figure of a flat $2,000.00.

Q. Did you see another plan that looked like

(Testimony of Victor F. Gothberg.)

that one—not that paper, but one the steel company had on the job when they were putting it up?

A. No, I never seen the plan.

Q. Were you ever there when they were setting the steel? A. No, I wasn't.

Q. When you talked to Mr. Anderson about the steel, did he say anything to you about who had made the steel? A. No, he didn't.

Q. How come you to later know to call some steel company—that they were the ones that made it?

A. There is only one that does that construction in Anchorage. They are the only one I could call to do the erection of steel.

Q. You found out, though, that the steel was fabricated in Seattle, didn't you? A. Yes.

Q. It wasn't fabricated here at all, was it?

A. No.

Q. And the only way you could have figured on the steel and the handling of it was to have seen some plan?

A. No. He told me how much to erect it, and he told me $2,000.00, and I says the job is yours. [706]

Q. Who did you call?

A. That steel company that's down on Third Avenue. I believe they call it Pacific Steel.

Q. Pacific Steel down on Third Avenue?

A. Yes, I believe so.

Q. That was in Anchorage?

A. That was in Anchorage.

Q. Did you show them a map or plat, or anything, of what had to be done? A. No.

(Testimony of Victor F. Gothberg.)

Q. They just guessed at it?

A. They told me over the telephone that the steel was in the design of the plan and they could figure it.

Q. Do you know who gave them that plan?

A. I don't know who give it to them, no.

Mr. Bell: That's all.

Court: That completes the testimony——

Mr. Bell: Your Honor, at the close of all the testimony I would like to reoffer in evidence the figures and specifications, and the report of the engineer, Victor C. Rivers. I think now that since everybody has testified, that this should be before the jury.

Court: Is there objection?

Mr. Arnell: We have the same objection to it, your Honor, that we had before. [707]

Court: The objection is sustained. If Counsel desires, in order to get it in the record, perhaps it better be marked for identification—Plaintiff's Exhibit V.

Mr. Bell: Your Honor, if you would like, may I suggest that if Mr. Arnell and I are both willing, at this time that the bailiff take the jury to the scene and see this building with none of us there. Just let them go with the bailiff.

Court: That is agreeable to me. I think it may conceivably be helpful. Who is going to pay for the taxicabs? That is the next thing.

Mr. Bell: Your Honor, I thought we might be able to get a bus, if we could.

Court: That would be better. Get a bus, and then when you have inspected the building, I think, to keep the proceedings regular, you better come back here and the case will be continued until Monday afternoon. Two ladies today, Mrs. Hoffman and Mrs. Lohmes, inquired whether they might be excused on Tuesday. It seems they have some duties in connection with the City election that is to take place on Tuesday. The matter here involves considerable consequence to a lot of people, and it is not easy to postpone it. Therefore, when we adjourn with this trial today, we will adjourn until Monday afternoon at 2:00 o'clock, and I expect it will take a good share of the afternoon for Counsel to argue the case and for the Court to instruct the jury, so the case may not go to the jury until [708] fairly late on Monday afternoon. And, speculating again, that the jury should not be able to agree promptly, why, Mrs. Hoffman and Mrs. Lohmes, I think, may be still debating on the case on Tuesday, so I think you better get yourselves excused from service on the Election Board on Tuesday, if that might be done; otherwise, you may find the Election Board may be without your services. I don't know where we can get a bus, do you, Mr. Bell?

Bailiff: I can probably call the bus station. I am willing to take my car. I can take five or six people.

Mr. Bell: Two or three taxis can take them.

Mr. Young: I have a car and I could take about six, if they want to sit in it.

Court: We better not crowd too much. We better

get at least one taxi, and I shall advance whatever money is necessary to pay the fare. If you pay it, let me know, and we will charge it to the party. Ladies and gentlemen of the jury, you are about to inspect the premises. You should not talk with anybody around there, because that would be the equivalent of getting testimony out of the presence of the Court and Counsel. Just go in and look it over and don't say anything more than "How do you do" or "Good afternoon" to anybody there, and don't ask any questions and don't permit anybody to talk to you about it. Then, when you are all through, come back here and report in, and then you will be excused until Monday afternoon at [709] 2:00 o'clock. The Court now stands in recess until 4:30 this afternoon.

Whereupon the trial of the above entitled cause was continued from 3:50 o'clock, p.m., until 4:57 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present. Ladies and gentlemen of the jury, the trial of this case will be continued until next Monday afternoon at 2:00 o'clock. Please report next Monday afternoon at 2:00 o'clock, and the Court stands adjourned until 10:00 o'clock tomorrow morning.

Whereupon at 4:58 o'clock, p.m., October 2, 1952, the trial of the above entitled cause was continued until 2:00 o'clock, p.m., October 6, 1952.

Be Is Further Remembered, That at 2:00 o'clock, p.m., October 6, 1952, the trial by jury of the above

entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceeding were had:

Mr. Bell: Your Honor, I have three motions I would like to make as preliminary motions, in addition to one I made to dismiss as to Mrs. Carr.

Court: Yes, the motion to dismiss as to Mrs. Carr will be [710] granted at the close of the trial and before arguments.

Mr. Bell: You covered that in the instructions. I have three motions I would like to make for Burton E. Carr.

Court: Do you wish to make them now? If you wish, I intend to let Mr. Carr testify with respect to the testimony by Mr. Anderson. Ladies and gentlemen of the jury, I thought when we ended last Thursday that that was the end of the testimony. Mr. Carr was on the stand in surrebuttal, and he was asked certain questions which the Court excluded, and then Counsel for Defendant Mr. Carr, made a certain offer of proof—some matters with respect to the testimony given by Mr. Anderson, the engineer. I think a part of Mr. Anderson's testimony should have gone in with the plaintiff's case in chief, before the plaintiff rested, and other facts were undoubtedly surrebuttal. It is not so easy to sort it all out, but I believe now, upon reflection, that justice would best be done by per-

mitting Mr. Carr to resume the stand and testify with respect to certain claims asserted by Mr. Anderson, concerning which Mr. Carr did not testify when he was on the stand before. Therefore, the order excluding the testimony of Mr. Carr is set aside and the defendant may resume the stand and Counsel may proceed with examination within the limited scope herein indicated. The defendant may resume the stand.

Whereupon Mr. Carr resumed the stand in his own behalf and testified as follows: [711]

BURTON E. CARR

Redirect Examination

Q. (By Mr. Bell): You are the Burton E. Carr, who is the defendant in the case, are you not?

A. Yes.

Q. Mr. Carr, did you hear Mr. Anderson testify just during the last day of the trial of this case?

A. Yes.

Q. I will ask you if, when you paid Mr. Anderson and his partner, Mr. Smith, this $2,725.00, what did Mr. Anderson say to you about the supervision of the job?

A. Well, Mr. Anderson and Mr. Smith were there, and when I presented this check he said, "Now, on the inspecting of the building, we will inspect the building. Either I or Mr. Anderson will be there 8 hours a day, or else, if we are not able to be on the job, we will have a paid man on the job at all times."

(Testimony of Burton E. Carr.)

Court: Do you remember whether you testified to that when you were on the stand?

Mr. Carr: I don't think there was any questions asked. Now, one particular thing, I believe I testified something similar about the same thing, and then we give him this check, and then right away Mr. Smith, he took a trip to the states, on his vacation, and I never did see him again to this day. I never seen him. [712]

Q. Did you ever see Mr. Anderson on the job during the construction of this building?

A. Only one time is all.

Q. And when was that?

A. That was—we had some controversy about the foundation, where they hooked the foundation on to the old foundation—it wasn't satisfactory and I told him I believed that would crack off, and he said no, it wouldn't. We were supposed to meet him there the following Sunday, and I dug down and it was all frozen solid, at least four feet of freeze. I dug down about two and one-half feet—I am sure it wasn't three feet, and then I put the shovel underneath and there was just nothing but gravel.

Court: My recollection, Counselor, is that all this was gone over.

Mr. Bell: Yes, I didn't ask about that.

Q. I asked you what was the occasion of your having seen him on the job the one time you have referred to?

(Testimony of Burton E. Carr.)

A. That was on account of the foundation—that is the only one.

Q. And did you ever ask him not to come or release him from coming?

A. Oh, no, I never did. I had a lot of telephone conversations trying to get him down there, and he said he would take it up with Gothberg, and I could never get him down on the job, but he claimed he came up—not in my presence, or it was [713] dark, and I didn't see him. How he could do any inspection then—he couldn't see what was covered up.

Mr. Bell: That's all.

Mr. Kurtz: Did I understand you to say that Mr. Anderson was present when the foundation was being built?

Mr. Carr: Yes.

Mr. Kurtz: Did you also testify that at that time you dug down and discovered that there was about three or four feet of freeze?

Mr. Carr: Yes, there was that much freeze.

Mr. Kurtz: When was the foundation completed?

Mr. Carr: The foundation was in at that time, but I didn't like the installation of the foundation.

Mr. Kurtz: When was the foundation actually completed?

Mr. Carr: Oh, let's see, I'll tell you. The reason why I dug down there——

Court: Just answer the question first.

Mr. Carr: That was in—let's see—that was pretty near early spring or early summer when I—you see,

(Testimony of Burton E. Carr.)
the foundation cracked, and that is the reason I dug down.

Mr. Kurtz: I understand he was there inspecting it when the foundation was being constructed. My question is, when was the foundation completed?

Mr. Carr: Well, the foundation was in, I believe, around August, I believe, but after this crack, I didn't know this [714] foundation was going to crack. After the weight on the building on top, it cracked—that was the reason I dug down—I wanted him to look at it.

Mr. Kurtz: Did you testify that at the time it was being constructed, you dug down—I believe you stated you objected to the way they were constructing the foundation?

Mr. Carr: Yes, I objected to the way they was constructing it, because I didn't think it would hold up, and after the weight of the buiding got down there, and it cracked in the winter time—well, then I decided to dig down then, and Mr. Anderson was supposed to be there and he wasn't. I called him up and I told him I dug down, so he was supposed to be there on the following Sunday, so then I recovered it up again on the top until he would come down himself, but he never did come because it was never disturbed at all. He claimed he inspected it, but I know he didn't—he wasn't down there.

Court: That appears to be all, Mr. Carr.

Whereupon Mr. Carr left the witness stand.

Court: That concludes the testimony as I understand. Counsel for plaintiff wishes to make some motions. Do you wish to make them in the presence of the jury?

Mr. Bell: I am presently willing to come up to the bench so as not to disturb the jury.

(Counsel and Reporter approached the bench.)

Mr. Bell: Comes now the defendant Burton E. Carr, and [715] moves the Court to require the Plaintiff to elect whether he will proceed further on the right to recovery on the written contract, or whether he will proceed on the right of recovery on quantum meruit.

Court: The motion is denied unless you want to argue it.

Mr. Bell: No, I am not going to argue it, your Honor, because I have already argued it to you. Now, I want to move to dismiss. Comes now the defendant Burton E. Carr, and moves the Court to dismiss the Plaintiff's causes of action each separately. This motion being directed to each of them, 1, 2, 3, 4, and 5, and moves directly against each of the causes of action for the reason that there is no evidence brought before the Court justifying any recovery on any theory of either one of the 5 motions, especially is this true due to the fact that the question of substantial compliance is a question of law for the Court and not a question of fact for the jury, and there is an admission on the part of the Plaintiff that he did not comply with several sections of the specifications, and there is testimony showing 34 failures to comply with the

terms of the contract and specifications and plans, and a great many of the 34 have been testified to and have never been answered, and the Plaintiff has never claimed to have complied with them, and therefore it comes under the theory that it is not a substantial compliance and, of course, the Plaintiff could not, under any sense, recover on the strict compliance rule [716] and then, if he recovers at all, it will have to be on the substantial compliance rule, and the substantial compliance rule being that he must prove that he has substantially complied with all of the terms of the contract and that he did not carelessly or intentionally or purposely fail to comply with any specification, because if he did that, then we are entitled to an instructed verdict for the defendant on the plaintiff's causes of action, since they are all based upon the same pair of contracts, and there being no dispute that he has, and the plaintiff stated that Mr. Carr tried to get him to do some things about complying with the terms of the contract, and that he told Mr. Carr if he would pay him $10,000.00 on the contract, he would go ahead and do it, but he would not do it unless Mr. Carr paid him the $10,000.00, and, further, it is clear that he intentionally refused to comply with the terms of the contract, and therefore substantial compliance does not apply.

Court: The motion is denied as to each of the causes of action.

Mr. Arnell: In order that the record may be complete, I wish to present first, a motion for a

directed verdict as to the plaintiff's first cause of action, and a motion for a directed verdict as to the plaintiff's second cause of action, and also a motion for a directed verdict as to the plaintiff's fifth cause of action. I believe it is an amount that involves the $3,925.00, approximately, upon the grounds that the defendant [717] has not presented a valid defense to any of these causes of action and such evidence that the defendant has presented does not support the defenses *pleased* in his answer and cross complaint. There is no evidence before the Court or the jury on behalf of the defendant which refutes or denies that the plaintiff is not entitled to recover.

Court: You mean as to the first, second, and fifth causes of action?

Mr. Arnell: Yes. Except by way of the fact that any recovery that the defendant might have or make will be based entirely upon such recovery, if any, as he makes upon the cross complaint, and I would like, also, to move that the defendant's cross complaint be dismissed on the grounds that it is not supported by the evidence.

Court: That motion is denied unless you wish to argue it further.

Mr. Arnell: No.

Court: All of the instructions submitted, both on behalf of the plaintiff and defendant will be refused except as covered by instructions given. The Court may give some additional instructions to take care of some features, but at this time, under the rule which requires the Court to announce

the disposition of the proposed instructions, the decision must be that all will be refused except as covered by instructions given. [718]

Mr. Arnell: May we approach the bench? I believe there has been a typographical error as to the amount in one of the instructions.

Court: I figured the amounts and had Mrs. Knutson figure. What is it?

Mr. Arnell: It relates to the 4th cause of action, and the particular instruction I have reference to is No. 4, line 8. I think the amount there should be $5,351.74 instead of 43.

Court: That is my recollection, too. Let me see. I guess it is the same way in the amended complaint.

Mr. Arnell: Our stenographer made a mistake in the second one, and I told her to correct it, and I think she did before it was filed.

Court: We will see. Yes, $5,351—that will be changed in the instructions. Counsel may amend their copies of instructions No. 4, in line 8, by inserting the figure "5" instead of the figure "4" in line 8. Change it from 4 to 5. By some mischance 4 was substituted for 5 in the instructions. Counsel for plaintiff may make opening argument to the jury. If Counsel desire, if both agree, I will impose a limit on each side. If not, there will be no limit.

Mr. Arnell: I would just as soon have a limit, your Honor.

Court: Well, if you and Mr. Bell can agree on it, it is [719] all right. If you cannot—I do hope

you can finish this afternoon. If you cannot, why then we will have to go on tomorrow.

Mr. Bell: I will agree on an hour a side, your Honor.

Mr. Arnell: That is agreeable to me. I hope to take a lot less time than that.

Court: It will be an hour per side, and counsel may divide up the time. Counsel for plaintiff, of course, will take it all.

Opening argument was then made to the jury by Mr. Arnell.

Court: The jury will remember the instructions of the Court as to duty and the Court will stand in recess for 10 minutes.

Whereupon at 2:45 o'clock, p.m., the Court recessed until 2:56 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present. Counsel for defendant may argue the case to the jury.

Argument was then made to the jury by Mr. Sanders and Mr. Bell.

Court: The jury will remember the instructions of the Court as to duty, and the Court will stand in recess for 10 minutes.

Whereupon the Court at 3:58 o'clock, p.m., recessed until [720] 4:10 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present.

Closing argument was then made to the jury by Mr. Arnell.

Court: In Instruction No. 1, page 3, line 15, after the figure "$20,000.00," I have inserted another sentence which was inadvertently omitted: "The plaintiff denies the affirmative averment of defendant's cross complaint and amended answer." I stated that the jury would be so instructed.

Court: Ladies and gentlemen of the jury, it now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors you obligated yourselves by oath to try well and truly the matters at issue between the plaintiff and the defendant in this case, and a true verdict render according to the law and the evidence as given you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court, even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the facts in the case, applying thereto the law as declared to you by the [721] Court in these instructions, and your decision thereon as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

1.

This is an action brought by the plaintiff, Victor Gothberg, an individual doing business as the Gothberg Construction Company, against the defendant, Burton E. Carr, his wife, Marie Carr, Jack Akers and Sherman Johnstone. By order of the Court heretofore made, the action has been dismissed as to the defendants Marie Carr, Jack Akers and Sherman Johnstone, and as a consequence thereof, Burton E. Carr is now the sole defendant in the action.

This action is based upon several contracts for the construction of a building, the building itself and additional finish work and other work pursuant to changes in the original plans whereby the plaintiff asserts that there became due and owing to him from the defendant a total sum of $51,-779.16, upon which the defendant has paid the sum of $34,605.00, leaving a balance due, owing and unpaid from the defendant to the plaintiff in the amount of $17,174.16.

The plaintiff asserts that the first contract between plaintiff and defendant related to the construction of a foundation for the building afterwards erected thereon; that [722] the foundation had been built by others but by reason of some City ordinance it was required that the foundation of the building to be constructed be moved further to the rear of the lot and that as a consequence, it was necessary to move the front part of the foundation to the rear, a distance of about 12 feet, and to build a new rear foundation approximately 12 feet further toward the back end of the lot than

was the foundation originally built; that although a written contract was entered into between the parties to do foundation work for the compensation of $2,542.00, such changes were made by oral agreement as to result in a final price of $4,051.84, which is claimed by the plaintiff for that part of the work. This last figure is in error by $50.00, and should be $4,001.84.

After beginning the trial of this action the plaintiff filed herein an amended complaint embracing five separate causes of action covering the different features of the contracts and agreements between the plaintiff and defendant. In the first two causes of action contained in the amended complaint, the plaintiff refers to the contract of May 25, 1950, for construction work on the foundation at the agreed value of $2,542.00 and asserts, in his second cause of action, that at the instance and requests of defendant, the plaintiff performed additional work thereon of the value of $1,459.84, thus making the total of $4,001.84 hereinbefore referred to.

It further appears from the plaintiff's amended complaint [723] and from the evidence that a written contract was made between plaintiff and defendant for the construction of a building on the foundation above mentioned at an agreed cost of $38,450.00 with provision for possible additional work; that after the signing of the contract, which embraced by reference plans and specifications, the plaintiff performed additional work on the building partly in the nature of finishing work and partly by reason of changes agreed upon by the parties,

so that eventually, the total charge of the plaintiff to defendant for all of such work amounted to $47,-722.32. This sum added to the plaintiff's charge against the defendant for the foundation work brings the total claimed by plaintiff, as shown above, to $51,779.61, on which has been admittedly paid the sum of $34,605.00, leaving a balance due and owing from defendant to plaintiff, as asserted by plaintiff, in the amount of $17,174.16.

The defendant, in his answer and cross complaint and in his answer to the amended complaint, which by reference also embodies the cross complaint, asserts that the only contract between plaintiff and defendant with respect to the foundation was a written contract calling for payment of $2,542.00, that all this has been paid and hence there is nothing due from the defendant to the plaintiff upon the plaintiff's claim for compensation having to do with the foundation of the building. With respect to this subject, you will recall that the defendant has stated that a part of the work done in the basement boiler [724] room is to be considered as extra work and not included in the construction price of the building of $38,450.00 provided in the contract, but the defendant further stated that such extra work was not worth more than $250.00.

The defendant in his answer and cross complaint and his answer to the plaintiff's amended complaint, alleges that he has paid to the plaintiff on the contract for the construction of the building several sums amounting in all to $34,672.57; and that the defendant further paid out various sums to do work

on the building and furnish material therefor which was required to be done by the plaintiff under the contract. The defendant further avers in the cross complaint and in his testimony in support thereof, that the plaintiff failed and refused to perform many items of work and labor and failed to supply certain materials which, the defendant asserts, plaintiff was bound to perform, supply and furnish under the terms of the contracts; that the plaintiff failed to do much of the work on the building in a good and workmanlike manner; and that as a result of all of these violations of contract on the part of plaintiff, the defendant has been damaged in the sum of $20,000.00.

The plaintiff denies the affirmative averments of defendant's cross complaint and amended answer.

When you retire to consider of your verdict you will take with you to the jury room the pleadings in this action [725] consisting of the plaintiff's amended complaint and the answer and cross complaint filed by and on behalf of the defendant and his answer to the amended complaint, so that you may, if you wish, read these pleadings and thus perhaps gain a clearer concept of the various claims and contentions of the parties, one against the other.

However, you should remember that pleadings are in no sense evidence. You should not consider any pleading as evidence that the pleader is entitled to what he claims. The pleadings merely serve the purpose of setting forth the claims and contentions of the parties and if any assertion or fea-

ture of any pleading is not supported by sufficient evidence, it should be disregarded entirely. Your decision in this case must be based as to the facts upon the testimony given in open court and the other evidence presented to you in open court, and also, as to the law only, upon instructions of the Court. You have been permitted during the trial to view the premises in dispute, and accordingly you may also consider the knowledge you have gained by such inspection, but in considering that knowledge, you must remember that a considerable period of time has elapsed, approximately 1½ years, since the building went into the possession of the defendant, and hence, allowance must be made for natural changes which would take place during that period even if all of the work contemplated by the contracts between the parties was done in good and [726] workmanlike fashion.

2.

In a civil case, such as this is, the burden of proof rests upon the party holding the affirmative with respect to any issue, and under that rule he is required to prove such issue by a preponderance of the evidence. By a preponderance of the evidence is meant the greater weight of the credible evidence, that evidence which in your judgment is the better evidence and which has the greater weight and value and the greater convincing power. This does not necessarily depend on the number of witnesses testifying with respect to any question of fact, but it means simply the greater weight or the

greater value and convincing power and which is the most worthy of belief; and so, after having heard and considered all the evidence in the case on any issue, you are unable to say upon which side of that issue the evidence weighs the more heavily, or if the evidence is evenly balanced on any particular issue in the case, then the party upon whom the burden rests to establish such issue must be deemed to have failed to prove it.

Under the rule above stated, the burden is upon the plaintiff to prove the material averments of his amended complaint by a preponderance of the evidence. Similarly, the burden is upon the defendant to prove the material averments of his cross complaint by a preponderance of the evidence. [727]

3.

In considering the contract between the parties for the construction of the building, you are charged that the plans and specifications admitted in evidence are a part of that contract and each of the parties is bound to a faithful fulfillment of the provisions thereof.

There is nothing in the law to forbid the parties to such a contract to modify the terms thereof including the plans and specifications by oral agreement and if you should find from the evidence that any term or provision or item of the contract, including the plans and specifications, was, after the signing of the contract, changed or modified by oral agreement of the parties, then you must give

effect to such changes or modifications in the verdict which you will render in this case.

By stating that each of the parties is bound to a faithful fulfillment of the provisions of the contract, it is meant that there must be a substantial, rather than literal, compliance with the provisions of such contract. "Substantial compliance," with reference to contracts, means, that although the conditions of the contract have been deviated from in trifling particulars not materially detracting from the benefit the other party would derive from a literal performance, he has received essentially the benefit he expected. [728]

3-A

With further reference to substantial performance of the contracts, there is a substantial performance where the variance from the specifications of the contracts is relatively trivial and unimportant and is one by which the building and structure as a whole is not impaired and where the building and structure is actually used after it is erected for its intended purpose and where the defects can be remedied by the owner without any great expenditure and without material damage to other parts of the property and may without injustice be compensated for by deductions from the contract price. On the other hand, to constitute substantial performance, a general adherence to the plans prescribed is not sufficient and the contract is not substantially performed if the builder wilfully, carelessly or in bad faith fails in his duty of per-

formance or leaves his work incomplete in any substantial and material respect or makes deviations and omissions without the consent of the owner, that affect a large saving to himself and a consequent damage to the owner, or which are so substantial as not to be capable of remedy and an allowance out of the contract price will not give the owner essentially what he contracted for.

3-B

If you find under the law as stated in these instructions that the plaintiff failed to perform substantially any of the several contracts, whether written or oral, here sued upon by [729] plaintiff in his five separate causes of action as stated in his amended complaint, and did not substantially perform and carry out such contract, the plaintiff is not entitled to recover anything whatever on such contract which has not been substantially performed.

4.

In the plaintiff's second, fourth and fifth causes of action, he claims compensation for work done and material furnished not covered by the written contracts between the parties which are dated May 25, 1950, and September 19, 1950, the earlier one concerning the foundation of the building and the latter the construction of the main building itself. The amount claimed in the second cause of action is $1,459.84 and in the fourth cause of action $5,351.74 and in the fifth cause of action $3,925.00. You should consider the evidence in support of and

against the averments contained in these causes of action just the same as you consider the evidence upon the first and third causes of action. If you find that the plaintiff has proved by a preponderance of the evidence the material averments of his amended complaint with respect to any or all of these causes of action, you should give credit to the plaintiff in your verdict accordingly. The claims of the plaintiff based upon alleged oral contracts are to be considered just as carefully as those based upon the written contracts submitted in evidence. If you find [730] that the plaintiff has failed to support any of his claims against the defendant stated in any of his causes of action by a preponderance of the evidence then the plaintiff is not entitled to recover thereon as to the cause or causes of action so failing of support by a preponderance of evidence, and your verdict should be for the defendant thereon, in whole or in part, as the evidence justifies. The plaintiff should be allowed credit for that part or portion of his claim or demand, as respects any of his causes of action, that has been proved by a preponderance of the evidence, but not for any part or portion not so proved. This instruction is subject to the foregoing instructions, especially 3-B with respect to substantial performance of contracts.

It is your duty to determine upon all of the evidence and upon these instructions of the Court as to the law, whether the defendant is justly indebted to the plaintiff and if so, in what amount, or

whether the defendant is entitled to recover from the plaintiff damages and if so, in what sum.

You are charged that if the plaintiff substantially and faithfully performed his contracts made with the defendant you should return a verdict for the amount you find justly due him. Of course, the plaintiff is not entitled to the full amount claimed if he failed to do all of the work or furnish all of the materials which he contracted to do and furnish and you should make adjustments accordingly. [731]

In like manner, you should consider the claims of the defendant as stated in the evidence offered in support of the averments of his answer and cross complaint, and if you find from the evidence that the defendant is entitled to recover from the plaintiff damages arising from the failure of plaintiff to do the work and furnish the materials specified in the contracts, whether written or oral, then such damages should be deducted from any amount which you might find otherwise due to the plaintiff, and if those damages exceed the amount, if any, which you might find would otherwise be due to the plaintiff, a verdict should be rendered in favor of the defendant for the balance. It is your duty, as you know, to do equal justice between the parties to the action and you are the sole judges of all of the facts of the case.

As stated in the complaint, the plaintiff claims that there is due, owing and unpaid to him from the defendant the sum of $17,174.16, together with interest thereon at the rate of six per cent per annum from the first day of March, 1951.

If the plaintiff is entitled to recover from the defendant in any sum, he is also entitled to recover interest on that sum from the date when the debt became due at the rate of six per cent per annum, which is the legal rate of interest in the Territory of Alaska as to debts of this nature where no specific rate of interest is set out in the contract or otherwise fixed by law. [732]

If you find that the plaintiff is not entitled to recover any sum whatever from the defendant and that the defendant is entitled to recover any sum from the plaintiff, interest may be allowed in like manner on the amount which you find due from the plaintiff to defendant from the date upon which you find the same became due.

Plaintiff's Exhibit 7 in this case is a letter dated December 28, 1950, addressed to the plaintiff by Lorn E. Anderson, the engineer who drew the plans and specifications on behalf of the defendant. Defendant has testified that Anderson was recommended to him by the Plaintiff. In his testimony, the defendant has denied that Anderson had any authority from the defendant to write the letter dated December 28, 1950.

If you find that Anderson had authority from the defendant to write such a letter and deliver it to the plaintiff, then the defendant is bound thereby to the same extent as though he had written the letter himself. If you find that Anderson had no authority from the defendant, specific or general, to write such a letter, then the defendant is not bound by the letter. However, if you find that the

defendant orally directed the plaintiff to do the work specified in the letter, the defendant would be obliged to carry out such oral agreement irrespective of the letter.

All questions of law, including the admissibility of [733] testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although every injury has the power to find a general verdict which includes questions of law as well as of fact, you are not to attempt to correct by your verdict what you may believe to be errors of law made by the Court.

All questions of fact—unless so intimately relate to matters of law that a determination must be made thereon by the Court as questions of law—must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or

against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be [734] informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the

evidence offered [735] should be viewed with distrust.

While you are not justified in departing from the rules of evidence as stated by the Court, or in disregarding any part of these instructions, or in deciding the case on abstract notions of your own, or in being influenced by anything except the evidence or lack of evidence as to the facts of the case, and the instructions of the Court as to the law, and the inferences properly to be drawn from the facts and from the law as applied to the facts, there is nothing to prevent you from applying to the facts of this case the sound common sense and experience in affairs of life which you ordinarily use in your daily transactions and which you would apply to any other subject coming under your consideration and demanding your judgment.

During the trial of a case, it may be suggested or argued that the credibility of a witness has been "impeached." To "impeach" means to bring or throw discredit on; to call in question; to challenge; to impute some fault or defect to.

The credibility of a witness may be impeached by the nature of his testimony, or by contradictory evidence, or by evidence affecting his character for truth, honesty or integrity, or by proof of his bias, interest or hostility, or by proof that he has been convicted of a crime. The credibility of a witness may also be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to [736] any matter material to the case. However, the impeachment of

the credibility of a witness does not necessarily mean that his testimony is completely deprived of value, or even that its value is lessened in any degree. The effect, if any, of the impeachment of the credibility of the witness is for the jury to determine.

Discrepancies in the testimony of a witness, or between his testimony and that of others, if there be any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent mistake in recollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently, or see or hear only portions of it, or that their recollections of it will disagree. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of serious importance. Whenever it is practicable and reasonable, you will attempt to reconcile conflicting or inconsistent testimony, but in every trial you should give credence to that testimony which, under all the facts and circumstances of the case, reasonably appeals to you as the most worthy of belief.

You are not bound to believe something to be a fact simply because a witness has stated it to be a fact, if you believe from all the evidence that such witness is mistaken or has [737] testified falsely concerning such alleged fact.

Where witnesses testify directly opposite to each other on a given point, and are the only ones that

testify directly to that point, you are not bound to consider the evidence evenly balanced or the point not proved; but in determining which witness you believe on that point, you may consider all the surrounding facts and circumstances proved on the trial, and you may believe one witness rather than another if you think such facts and circumstances warrant it.

The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff is entitled, adding the amounts so set down, and then dividing the total by the number of jurors, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no circumstances should you resort to that method of adjusting differences of opinion among yourselves.

At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which [738] you have heard and the proper deductions therefrom and the law as given to you by the Court in these instructions. But arguments of counsel if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be

mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, on considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict.

No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to select one particular instruction [739] and consider it to the exclusion of the other instructions.

As you have been heretofore charged, your duty is to determine the facts from the evidence admitted in the case, and to apply to those facts the law as given to you by the Court in these instructions.

During the trial I have not intended to make any comment on the facts or express any opinion in

regard thereto. If, by mischance, I have, or if you think I have, it is your duty to disregard that comment or opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

When you retire to consider of your verdict you will take with you to the jury room the pleadings in the case, the exhibits, these instructions and two forms of verdict. You will thereupon elect one of your members foreman who is to speak for you and sign and date the verdict unanimously agreed upon. If you find for the plaintiff and against the defendant you will insert in the verdict which has been prepared for that contingency and which is marked "Verdict No. 1" the sum which you find that the plaintiff is entitled to recover of and from the defendant and your foreman will thereupon date and sign the verdict and you will return the same into Court as your verdict.

Similarly, if you find that the plaintiff is not entitled to recover any sum whatever against the defendant, and that the defendant is entitled to recover from the plaintiff, you will [740] insert in the form of verdict which has been prepared for that contingency and which is marked "Verdict No. 2," the amount which you find the defendant is entitled to recover from the plaintiff and your foreman will thereupon date and sign that verdict and you will return the same into Court as your verdict.

If you find that neither party is entitled to recover any sum whatever from the other, then you

will still use Verdict No. 2, but will insert the word "no" in the blank space before the word "Dollars" and your foreman will thereupon date and sign the verdict and you will return the same into Court as your verdict. In this fashion you will find for the defendant and against the plaintiff but will further find that the defendant is not entitled to recover any sum whatever from the plaintiff. Under such a verdict, the defendant is entitled to recover his costs from the plaintiff but that is a matter of law with which you have no direct concern.

With your verdict you will return into Court the pleadings, the exhibits, these instructions and the form of verdict not used by you.

Dated at Anchorage, Alaska, this 6th day of October, 1952.

/s/ ANTHONY J. DIMOND,
District Judge.

Court: I think Instruction 4, as has been read to the jury, may possibly be misleading, even though the jury is instructed that the instructions must be considered as a whole, [741] so at the end of Instruction 4 as typed, I have written the following: "This instruction is subject to the foregoing instructions, especially 3-B with respect to substantial performance of contracts." Counsel may now come to the bench with the Reporter, to take exceptions to the instructions given and refused.

(Counsel and Reporter then approached the bench.)

Court: Counsel for plaintiff may first take exceptions.

Mr. Arnell: We have no exceptions, your Honor.

Court: Counsel for plaintiff takes no exceptions. What about your instructions refused—do you want to do anything about them?

Mr. Arnell: No; you substantially covered them by your instructions, your Honor.

Mr. Bell: The defendant takes exception to Instruction No. 1, on page 1, in which it reads as follows: "This action is based upon several contracts for the construction of a building, the building itself and additional finish work and other work pursuant to changes in the original plans whereby the plaintiff asserts that there became due and owing to him from the defendant a total sum of $51,779.16, upon which the defendant has paid the sum of $34,605.00, leaving a balance due and owing and unpaid from the defendant to the plaintiff in the amount of $17,174.16." This is very confusing because there is only two written contracts before the Court, and by referring to [742] several contracts it is quite apt to confuse the jurors, and for the further reason it becomes an affirmative statement instead of a statement of the contention of the plaintiff.

Court: I think the criticism is valid; I am going to say "upon two written contracts and three alleged oral contracts"—maybe you will except to to it anyway.

Mr. Bell: I am afraid that would help it but

wouldn't cure it, because we have nothing admitted except as to the two contracts.

Court: This is a statement of the plaintiff's claim.

Mr. Bell: If you had said "according to the plaintiff's contention, this is an action based upon certain things," then I wouldn't object, but you see it leaves an affirmative statement of the figures here—this is not the figure our checks total.

Court: I will insert "the plaintiff asserts that this action is based * * *" It will read now, "The plaintiff asserts that this action is based upon two written contracts and three alleged oral contracts."

Mr. Bell: At the bottom of the page, exception to these words: "such changes were made by oral agreement as to result in a final price of $4,051.84."

Court: I think I will let that stand; I think it is clear that that is an assertion of the plaintiff and not in the statement the Court is making. [743]

Mr. Bell: I wish to except to the first 16 lines of Instruction 1, page 2, for the reason that it leads the jury to believe that the facts set out therein are established, and takes from the jury at least a certain per cent of the right in determining that some of these are disputed facts.

Court: I think that is clear.

Mr. Bell: Now, on Instruction 1, page 4, we wish to except to these words commencing on line 4, "You must remember that a considerable period of time has elapsed, approximately 1½ years, since the building went into the possession of the defendant, and hence, allowance must be made for

natural changes which would take place during that period even if all of the work contemplated by the contracts between the parties was done in good and workmanlike fashion." Now, I want an exception in full to the two last paragraphs of Instruction Number 3, as not stating the law on substantial performance and erroneously misleading in the words that are set forth, and I wish an exception to these words in Instruction 3-A, commencing in line 4, reading as follows: "and is one by which the building and structure as a whole is not impaired and is actually used after it is erected for its intended purpose and where the defects can be remedied by the owner without any great expenditure and without material damage to other parts of the property and may without injustice be compensated for by deductions from the contract price." I especially object to the word "large" in the [744] fourth line from the bottom as overemphasizing the explanation.

Court: I got that out of a book, which are not always right.

Mr. Bell: We object to the words commencing in Line 26 of Instruction Number 4, as follows: "The plaintiff should be allowed credit for that part or portion of his claim or demand, as respects any of his causes of action, that has been proved by a preponderance of the evidence, but not for any part or portion not so proved." Object to that on the theory that no substantial compliance has been proven. I think that is all. Now, your Honor, the

defendant has four instructions, and may I have you mark those and file them in the case?

Court: I have already marked them "refused except as covered by instructions given. Exception taken."

Mr. Bell: That's fine.

Court: You don't care to have yours filed, Mr. Arnell?

Mr. Arnell: No.

Court: I better make a note of it here. Defendant has requested four instructions in all, which have been considered by the Court; each of them is refused except as covered by instructions given and the defendant has taken an exception to the refusal of the Court to give each of the instructions as submitted, and the instructions so submitted may be incorporated in the record at this time.

(Counsel and Reporter leave the bench.)

Court: Ladies and gentlemen of the jury, after conference with Counsel I have made a change in Instruction Number 1, page 1. As originally stated, it would read, in the second paragraph, "This action is based upon several contracts for the construction of a building." That might be construed to mean that the judge is telling you that such is the case, whereas in this instruction I have tried only to put forward the contentions and claims of the parties, so I have changed it to read, "The plaintiff asserts that this action is based upon two written contracts and three alleged oral contracts for the construction of a building." The parties, I think, agree that they signed the two written

contracts, but they differ as to almost everything else, and you must remember in all of these instructions that I am not attempting to instruct you as to the facts of the case—that is your business, to determine the facts, and if you find any language here which you may think indicates that the Court is trying to instruct you on the facts, please disregard it. Do Counsel wish to stipulate for a sealed verdict?

Mr. Bell: I do.

Mr. Arnell: That's all right with me, your Honor.

Court: Bailiffs may be sworn.

R. E. Manchester and B. L. Willis were then sworn as Bailiffs.

Court: Ladies and gentlemen of the jury, it has been agreed that you may return what is known as a sealed verdict. [746] How many on the jury have acted on a jury rendering a sealed verdict? Many of you, but I am bound to read it to you: "Ladies and gentlemen of the jury: If you have not reached a verdict by 5 o'clock, p.m., today, then when you have agreed upon a verdict, have the foreman sign the same, seal it up in this envelope, and keep it in his possession, unopened. You may then separate and go to your homes. No juror must say anything about the verdict agreed upon. All of the jurors must be in the jury box in Court at 10 o'clock, a.m., of Tuesday, October 7, 1952, at which time the verdict will be handed to the Court and opened in the presence of the jury. Dated at Anchorage, Alaska, this 6th day of October, 1952. Signed Anthony J. Dimond, approved, E. L. Arnell, Plummer and Ar-

nell, Attorneys for Plaintiff, Bailey E. Bell, of Attorneys for Defendant." Ladies and gentlemen of the jury, you may now retire to consider of your verdicts. The Court will stand adjourned until tomorrow morning at 10:00 o'clock.

Thereupon, at 5:17 o'clock, p.m., October 6, 1952, the jury retired.

Be It Further Remembered that at 10:07 o'clock, a.m., October 7, 1952, the jury in the above entitled cause returned to the courtroom; all members of the jury panel being present and each answering to his or her name; the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding; [747]

And Thereupon, the following proceedings were had:

Court: Ladies and gentlemen of the jury, have you agreed upon a verdict?

Mr. Boward: We have, your Honor.

Court: You may present it to the bailiff. Although the jury has been continuously in session, the verdict is sealed; it is now opened. Two verdicts have been signed by the foreman; they may be read:

The clerk then read the following verdicts:

"In the District Court for the Territory of Alaska, Third Division, Victor Gothberg, an individual doing business as Gothberg Construction Company, Plaintiff, vs. Burton E. Carr, Defendant, No. A-7644." Verdict No. 1. "We, the jury, duly sworn and impanelled to try the above entitled cause, do find for the plaintiff and against the de-

fendant and do further find that the plaintiff is entitled to recover of and from the defendant the sum of Fourteen thousand two hundred fifty and 82/100 Dollars ($14,250.82), together with interest thereon at the rate of six per cent (6%) per annum, from the 1st day of March, '51. Dated at Anchorage, Alaska, this 7th day of October, 1952. Signed: Nevin H. Boward, Foreman."

"In the District Court for the Territory of Alaska, Third Division, Victor Gothberg, an individual doing business as Gothberg Construction Company, Plaintiff, vs. Burton E. Carr, Defendant, No. A-7644." Verdict No. 2. "We, the jury, duly [748] sworn and impanelled to try the above entitled cause, do find for the defendant and against the plaintiff and do further find that the defendant is entitled to recover of and from the defendant the sum of Eight thousand one hundred thirty-one and 63/100 Dollars ($8,131.63), together with interest thereon at the rate of six percent (6%) per annum from the 1st day of March, 1951. Dated at Anchorage, Alaska, this 7 day of October, 1952. Signed Nevin H. Boward, Foreman."

Court: I think you better take these verdicts back. These verdicts are only for your use, anyway, and I am not suggesting anything to you, but if you intend, and when I drafted the verdicts that is the way I expected to put it, if you wish to find that the defendant is entitled to recover of and from the plaintiff that sum of money, then strike out that word "defendant", and insert the word

"plaintiff". As the verdict stands, it is meaningless. A man can't recover any money from himself.

Mr. Boward: Would it be necessary, your Honor, to retire to the jury room?

Court: If the jury all agree, you can do it now; is that what you intended—that the defendant should recover from the plaintiff that sum of money? Do you all so agree?

(All members of the jury replied in the affirmative.)

Court: I think every juror has indicated consent. Very well, the foreman may come down and strike out that last "defendant", and put the word "plaintiff" in. The clerk will [749] now read the verdict as so amended. Just read the body of it.

Clerk: "We the jury, duly sworn and impanelled to try the above entitled cause, do find for the defendant and against the plaintiff and do further find that the defendant is entitled to recover of and from the plaintiff the sum of Eight thousand one hundred thirty one and 63/100 Dollars ($8,131.63), together with interest thereon at the rate of six percent (6%) per annum from the 1st day of March 1951."

Court: Now the verdict now reads, ladies and gentleman, that the defendant is entitled to recover of and from the plaintiff the sum of $8,131.63; is this your verdict, so say you all?

(All members of the jury replied in the affirmative.)

Court: Does anybody not agree to it? You have also heard Verdict No. 1 read, in which you have

given a verdict in favor of the plaintiff and against the defendant for *$1,425.82*; is that your verdict, so say you all?

(All members of the jury replied in the affirmative.)

Court: Does either of counsel care to have the jury polled on either verdict, or both verdicts?

Mr. Arnell: The plaintiff doesn't.

Mr. Sanders: The defendant does not, your Honor.

Court: Very well; thank you for your patience and labor, ladies and gentlemen. This has been a tedious case, extending over a long period of time. Another trial goes on at 1:00 this [750] afternoon; if any of you wants to report at that time we would be pleased to have you.

Thereupon, at 10:15 o'clock, a.m., October 7, 1952, the trial by jury of the above entitled cause was concluded. [751]

[Endorsed]: Filed July 31, 1953.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD

Comes now the appellant, Victor Gothberg, pursuant to the provisions of Rule 75, Federal Rules of Civil Procedure, and designates for inclusion in the record on appeal the pleadings, proceedings and evidence following:

1. Plaintiff's amended complaint.
2. Defendant's answer to amended complaint.
3. Transcript of testimony of all witnesses.
4. All exhibits.
5. Defendant's motion for a directed verdict at the close of plaintiff's evidence.
6. Plaintiff's motion for a directed verdict at the close of all evidence.
7. Instructions to jury.
8. Verdicts No. One and No. Two of jury.
9. Order denying motions for judgment or new trial.
10. Judgment.
11. Notice of Appeal.
12. This designation.
13. Statement of points on appeal.
14. Journal entries.

/s/ E. L. ARNELL,
Attorney for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed July 29, 1953.

[Endorsed]: No. 13959. United States Court of Appeals for the Ninth Circuit. Victor Gothberg, an individual doing business as Gothberg Construction Company, Appellant and Appellee, vs. Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, Appellees and Appellants. Transcript of Record. Appeals from the District Court for the Territory of Alaska, Third Division.

Filed: August 5, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13959

VICTOR F. GOTHBERG, Appellant,

vs.

BURTON E. CARR, Appellee.

ADOPTION OF STATEMENT AND DESIGNATION

Comes now Victor F. Gothberg, Appellant, by his attorney, E. L. Arnell, pursuant to the provisions of Rule 17 of the Rules of this Court, and hereby adopts for all purposes of this appeal the designa-

tion of record and statement of points contained in the record heretofore filed in this Court.

Dated this 17th day of August, 1953.

/s/ E. L. ARNELL,
Attorney for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 19, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEES' STATEMENT OF POINTS ON CROSS-APPEAL

Comes now the above named Appellees and for their statement of points relied upon on Cross-Appeal, set forth the same as follows:

1. The Court erred in overruling the Defendants' motion for Judgment dismissing the Plaintiff's various causes of action at the close of the Plaintiff's testimony.

2. The Court erred in overruling the Defendants' motion for a Judgment of dismissal of the Plaintiff's various causes of action at the close of all of the evidence.

3. The Court erred in overruling the Defendants' motion for Judgment notwithstanding the verdict, for the reasons set forth in the Motion itself, and especially the reason that the undisputed evidence showed a complete failure to comply with the terms

of the written contract and a complete failure of substantial compliance, and the Judgment of the trial court should have been for a dismissal of the Plaintiff's various causes of action and a denial of any recovery to the Plaintiff whatsoever.

4. The Court erred in refusing to give Defendants proffered Instruction No. 1.

5. The Court erred in refusing to give Defendants proffered Instruction No. 2.

6. The Court erred in refusing to give Defendants proffered Instruction No. 3.

7. The Court erred in refusing to give Defendants proffered Instruction No. 4.

Dated at Anchorage, Alaska, this 3rd day of August, 1953.

BELL & SANDER,
/s/ By BAILEY E. BELL,
Attorneys for Appellees, Burton E. Carr, Jack Akers and Sherman Johnstone.

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 6, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEES' DESIGNATION OF RECORD

Comes now the Appellees, Burton E. Carr, Jack Akers and Sherman Johnstone, pursuant to the provisions of Rule 75 and other Federal Rules of Civil Procedure, and designates and includes in the rec-

ord on appeal, the pleadings, proceedings and evidence as follows, in addition to the designation of record of the Appellant:

1. Plaintiffs' Original Complaint;
2. Defendants' Answer to Original Complaint;
3. Notice of Cross-Appeal filed by Appellees;
4. This Designation;
5. Appellees' Statement of Points on Appeal;
6. Defendants' Offered Instruction No. 1, which was refused by the Court and an exception allowed;
7. Defendants' Offered Instruction No. 2, which was served and filed by the Defendants below and refused by the Court and an exception allowed;
8. Defendants' Offered Instruction No. 3, which was duly served and tendered to the Court and filed, the giving of which was refused by the Court and an exception allowed to the Defendants;
9. Defendants' Offered Instruction No. 4, which was duly served, offered to the Court, and filed, and the giving thereof refused by the Court, and an exception allowed to the Defendants.

Dated at Anchorage, Alaska, this 3rd day of August, 1953.

BELL & SANDERS,

/s/ By BAILEY E. BELL,

Attorneys for Appellees, Burton E. Carr, Jack Akers, and Sherman Johnstone.

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 6, 1953. Paul P. O'Brien, Clerk.

No. 13959

United States
Court of Appeals
For the Ninth Circuit.

VICTOR GOTHBERG, an Individual, Doing Business as GOTHBERG CONSTRUCTION COMPANY,

Appellant and Appellee,

vs.

BURTON E. CARR, JANE DOE CARR, His Wife; JACK AKERS and SHERMAN JOHNSTONE,

Appellees and Appellants.

Supplemental
Transcript of Record

Appeals from the District Court for the Territory of Alaska Third Division

Phillips & Von Orden Co., 870 Brannan Street, San Francisco, Calif.—3-26-54

No. 13959

United States
Court of Appeals
For the Ninth Circuit.

VICTOR GOTHBERG, an Individual, Doing Business as GOTHBERG CONSTRUCTION COMPANY,

Appellant and Appellee,

vs.

BURTON E. CARR, JANE DOE CARR, His Wife; JACK AKERS and SHERMAN JOHNSTONE,

Appellees and Appellants.

Supplemental
Transcript of Record

Appeals from the District Court
for the Territory of Alaska
Third Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-26-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

In the District Court for the Territory of Alaska,
Third Division

No. A-7644

VICTOR GOTHBERG, an Individual, Doing Business as GOTHBERG CONSTRUCTION COMPANY,

Plaintiff,

vs.

BURTON E. CARR, MARIE CARR, His Wife; JACK AKERS and SHERMAN JOHNSTONE,

Defendants.

ANSWER AND CROSS-COMPLAINT

Comes now Burton E. Carr, one of the above-named defendants, and for his separate answer to the allegations of the complaint filed herein, admits, alleges and denies as follows:

I.

Defendant admits the allegations of paragraph I of the first cause of action.

II.

This defendant, for answer to the second paragraph of the first cause of action, does admit that he did agree to employ the plaintiff to put in the foundation but denies specifically that he agreed to pay $4,051.84, and alleges the facts to be that the plaintiff did not put in the foundation according

to the agreement and that the work on the foundation was defective and not as contracted for, and that the defendant only agreed to pay $2,542.00 for said foundation when the same was built in compliance with the terms of the written contract, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof, and this defendant further alleges that the plaintiff has been paid a sum of money in excess of the amount earned thereon and is justly indebted to this defendant by reason of the method and improper construction of said foundation, and this defendant has been damaged as will be set forth in this answering defendant's cross-complaint.

III.

This defendant for answer to the plaintiff's second cause of action admits that there was a written contract entered into wherein and whereby the plaintiff agreed to perform certain services, and the defendant agreed to pay for said services a certain sum of money, but denies specifically that the plaintiff ever performed said services in compliance with the written contract referred to in the plaintiff's second cause of action, and alleges the facts to be that the plaintiff breached the terms of said contract, failed, neglected and refused to comply therewith, and has been paid a large sum of money thereon over and above the amount actually due said plaintiff for any of the services he actually furnished and performed that were acceptable and in compliance with said contract, and

therefore this answering defendant denies that he is indebted to the plaintiff in any sum whatsoever on his second cause of action, or any part thereof.

IV.

This defendant denies the allegations of the third cause of action and the whole thereof.

V.

Defendant denies the allegations of the plaintiff's fourth cause of *action* and the whole thereof, except that defendant admits plaintiff has made various demands upon this defendant, which have been met, but the demand of this defendant for the plaintiff to perform the services and to complete the contract, and at all times offering to pay any indebtedness that he owed the plaintiff if he would finish the job in conformity to the plans, specifications and contract according to his agreement to do.

This defendant, having fully answered the plaintiff's Complaint, alleges that he is not indebted to the plaintiff in any sum whatsoever.

Cross-Complaint

Comes now the above-named defendant, Burton E. Carr, and for cross-complaint against the plaintiff, alleges and states as follows:

First Cause of Action

I.

That he did enter into a written contract with the plaintiff for certain foundation work, which

contract was executed on May 24, 1950; a copy of said contract is attached as this answering defendant's Exhibit "A," and said contract is hereby made a part of this cross-complaint as fully as if set out herein in full.

II.

This defendant further alleges that on the 19th day of September, 1950, the plaintiff and this defendant entered into a written contract for the construction of a certain building according to the plans and specifications which were then in the possession of both the plaintiff and this defendant, and after said plans and specifications had been examined in detail by both of the parties hereto, a copy of said contract of the 19th day of September, 1950, is hereto attached, marked Exhibit "B," and made a part hereof as fully as if set out in full herein.

III.

This answering defendant further states that the plaintiff failed, neglected and refused to finish the building according to the contract, plans and specifications, and by reason thereon is not entitled to maintain an action for the collection of the contract price, or any part thereof, or any other sum whatsoever.

IV.

This defendant further alleges that he has paid directly to the plaintiff the following sums: $10,381.50, $11,535.00, $12,756.07, making a total of $34,672.57; and that he has paid out for the plaintiff on matters that it was the plaintiff's duty

to pay the following, to wit: door locks, $47.00; anchorage installation for hooking up the wash-mobile, $175.95; and for time and material paid by this defendant for making and installing floor drain covers, $33.80; repair of neon unit broken by plaintiff's employee, $18.00; cost of connecting air compressor, parts, $5.43, and labor, $20.00; making a total of $34,972.75, for all of which this answering defendant is entitled to judgment against the plaintiff on his first cause of action of his cross-complaint.

Second Cause of Action

I.

This answering defendant further alleges that the plaintiff failed to comply with the terms of the two written contracts, specifications and plans, as follows, to wit:

1. That the principal contract provided for the furnishing of a bond to guarantee the compliance with the terms of the contract, which the plaintiff never furnished, even though requested so to do.

2. That the plaintiff failed to hook up the lights on the 76 pump.

3. Failed to install one globe for window light on marquee.

4. Failed to install front window glass that would fit the opening made by the plaintiff, and did cause to be installed a glass therein that is unsafe, too small for the opening, and does not meet the requirements of the plans and specifications.

5. Failed to install a proper shutoff valve below the concrete in front of the building to prevent the freezing of the outside hydrant, and did install the hydrant in such a sloppy, incompetent manner without proper shutoff so that the same froze on two different occasions, causing damage to parts and requiring labor to the extent of more than $20.00 to make repairs, and still there is no shut-off below the pavement in the proper position as meets the requirements of the ordinances of the City of Anchorage.

6. Inserted a charge of $500.00 and attempted to collect the same for changing of a steel beam that holds the marquee that the plaintiff contracted and agreed to install in the regular contract plans and specifications.

7. Failed to finish and install outlet plates on electrical contacts.

8. Failed to furnish solid brass cylinder locks on the front doors.

9. Failed to install push plates and kick plates on five doors as per contract.

10. Failed to furnish, install and equip two-way swing doors between the showroom and shop as provided in the contract.

11. Failed to finish the installation of one heating unit with motor.

12. Failed to install three thermostats in the showroom as provided for in the contract and specifications.

13. Failed to install two additional thermostats in the shop.

14. Failed to mount and install door frames in lead according to the terms of the contract.

15. Failed to finish the building on the outside and allowed projecting wires to extend, and has left the wall rough and uneven.

16. Failed to finish the building on the inside in a workmanlike manner.

17. Installed and laid cement blocks in freezing weather without properly protecting the wall and allowed the mortar between the blocks to become frozen and the wall is dangerous and apt to disintegrate.

18. Failed to insulate the water pipes, steam pipes and sewer pipes as provided in the contract.

19. Failed and refused to take out, reinstall and refinish one section of the cement floor in the showroow which was frozen during construction and is defective and will not stand.

20. Refused to correct a condition in the floor of the boiler room so that it would drain properly, even though requested so to do.

21. Failed to replace cement blocks over rear windows in shop where the mortar was frozen in installing them and had fallen out over and around the windows, leaving a dangerous condition and causing a waste of heat from within.

22. Failed to properly install all of the windows in the shop, same being still loose and improperly fitted.

23. Failed to put on one coat of red lead and two coats of aluminum paint on all steel used in the building, and that the red lead and one coat of the aluminum paint was never furnished or put on the steel.

24. Has attempted to make an extra charge for moving a steel beam over the electric door, which beam was set at the wrong place by the plaintiff and through no fault of this defendant, and said plaintiff has constantly demanded extra pay for correcting an error, in installment by him.

25. The floor in the garage was carelessly and negligently built so that it does not drain and the work in finishing the floor was not in a workmanlike manner but is defective and causes large pools of water to stand on the floor following the time that vehicles with snow on them or water are brought into the garage.

26. Failed to finish the walls in the men's rest room.

27. Refused to allow credit for 77 cement blocks saved by a change in the plans as to the installation of the south door to the garage, which blocks were of the value of $0.65 per block.

28. Failed to install proper exhaust pipe with swivel of a manufactured and recognized product according to contract.

29. Attempted to charge and refused to remove from statement for extras the doors leading to the showroom as such doors were included in the original contract, and the attempt to collect for these doors was arbitrary, capricious, and without any justifiable reason.

30. Failed to furnish and properly install doors with closing equipment on all outside constructions as required by the contract.

31. Failed to use heavy wire mesh in gas pump lanes as called for in the specifications.

32. Attempted to and did insist on charging for extras for installing of a hoist, which was included in the contract.

33. Failed to install the mirrors in the rest rooms.

34. Laid cement blocks in sub-zero weather without heat or enclosure in violation of the terms of the specifications and contract, and the mortar was frozen and is soft and of no benefit and the blocks are loose and caused the building to become unsafe.

35. Failed to finish the building at the specified time, to wit: December 1, 1950, and dilatorily allowed the building to be unfinished until February 24, 1951, and then the building was not finished at all and has never been finished, and this defendant is entitled to recover liquidated damages of $25.00 per day from December 1, 1950, to February 24, 1951, which amounts to $2,150.00, and is entitled

to recover damages at the rate of $25.00 per day from February 24, 1952, to such time as the building is finished according to the terms of the contract. That by reason of plaintiff's failure to comply with the terms of the contract, this answering defendant has been damaged by the plaintiff to the extent of $20,000.00.

Wherefore, this answering defendant, having fully answered the plaintiff's complaint, prays for relief of this Court as follows, to wit:

1. That the plaintiff have and recover nothing against this defendant.

2. That this answering cross-complainant have and recover judgment of and against the plaintiff for the sum of $20,000.00, together with all costs of this action, including a reasonable sum as attorneys' fees, and for such other and further relief as the Court deems just and equitable in the premises.

BELL & SANDERS,

By /s/ BAILEY E. BELL,

Of Attorneys for Defendant,
Burton E. Carr.

EXHIBIT "A"

Proposal for Revising
Nash Garage Foundation

Proposal of Victor F. Gothberg, 931 - 4th, Box 761, Anchorage, to furnish and deliver all materials and to do and perform all work in accordance with the specifications and contract of ..... for the revision of the Nash Garage foundation situated at Lot 1, Block 20, of the East Addition to the City of Anchorage.

To: Mr. Burton E. Carr,
Box 779, Anchorage, Alaska.

Dear Sir:

The undersigned bidder has carefully examined the form of contract, the general conditions, special conditions, the technical provisions and the drawings for the revision of the Nash Garage foundation hereinbefore described, and referred to in the "Invitation to Bidders" inviting proposals on such work dated ....., and also the site of the work, and will provide all necessary machinery, tools, apparatus, and other means of construction, and do all the work and furnish all material called for by said specifications, general conditions, special conditions, and drawings in the manner prescribed therein and in said contract, and in accordance with the requirements of the Engineer under them, for the sum of $2542.00.

The undersigned also agrees as follows:

First: To do any extra work, not covered by the above lump sum price, which may be ordered by the Engineer, and to accept as full compensation therefor such prices as may be agreed upon in writing by the Engineer and the Contractor in accordance with G. C. 15, "General Conditions."

Second: Within five days from the date of the "Notice of Acceptance" of this proposal, to execute the contract, and to furnish to the Owner a satisfactory contract bond in the sum specified by paragraph S. C. 9, "Special Conditions," guaranteeing the faithful performance of the work and payment of bills.

Third: To begin work on the date specified in the "Notice to Proceed," and to prosecute said work in such a manner as to complete it within forty-five calendar days.

Accompanying this proposal is a Bid Bond of $510.00 payable to Mr. Burton E. Carr which is to be forfeited, as liquidated damages, if, in the event that this proposal is accepted, the undersigned shall fail to execute the contract and furnish satisfactory contract bond under the conditions and within the time specified in this proposal; otherwise said certified check, or bid bond, is to be returned to the undersigned.

Dated 5-24-50.

(If an individual, partnership, or non-incorporated organization.)

Signature of Bidder:

/s/ GOTHBERG CONST. CO.,

By /s/ VICTOR F. GOTHBERG.

Address of Bidder:

931 - 4th, Box 761,
Anchorage.

Names and addresses of members of the firm:

.....

.....

(If a corporation.)

Signature of Bidder:

.....

By .....

(Name) (Title)

Business Address: .....

Incorporated Under the Laws of.....

Names of Officers:

President:

.....

(Name) (Address)

Secretary:

.....

(Name) (Address)

Treasurer:

.....

(Name) (Address)

EXHIBIT "B"

This Agreement made the 19th day of September in the year Nineteen Hundred and Fifty by and between Victor Gottberg, hereinafter called the Contractor, and Mr. Burton E. Carr, hereinafter called the Owner.

Witnesseth, that the Contractor and the Owner for the considerations hereinafter named agree as follows:

Article 1. Scope of the Work—The Contractor shall furnish all of the materials and perform all of the work shown on the Drawings and described in the Specification entitled "Construction of the Nash Garage," consisting of "Scope of the Work, General Conditions, Special Conditions and Technical Provisions" prepared by Alaska Engineering Supply acting as and in these Contract Documents entitled "Engineer" and shall do everything required by this Agreement, the Scope of the Work, the General Conditions, the Special Conditions, the Specifications and the Drawings.

Article 2. Time of Completion—The work to be performed under this Contract shall be commenced September 25, 1950, and shall be completed December 1, 1950. In case of failure on the part of the Contractor to complete the work within the time fixed in the Contract or any extension thereof, the Contractor shall pay the Owner as liquidated damages the sum of $25.00 per calendar day of delay until the work is completed or accepted.

Article 3. The Contract Sum—The Owner shall make payments on account of the Contract as provided therein, as follows: The lump sum price of Thirty-eight Thousand Four Hundred Fifty ($38,450.00) Dollars.

Article 4. Progress Payments—The Owner shall make payments on account of the Contract as provided therein, as follows:

> On or about the first day of each month ninety per cent of the value, based on the Contract price, of labor and materials incorporated in the work and of materials suitably stored at the site thereof up to the twenty-fifth day of the previous month, as estimated by the Engineer, less the aggregate of previous payments; and upon substantial completion of the entire work, a sum sufficient to increase the total payments to ninety-five per cent of the Contract price.

Article 5. Acceptance and Final Payment—Upon receipt of written notice that the work is ready for final inspection and acceptance, the Engineer shall promptly make such inspection, and when he finds work acceptable under the Contract and the Contract fully performed he shall promptly issue a final certificate, over his own signature, stating that the work provided for in this Contract has been completed and is accepted by him under the terms and conditions thereof, and the entire balance found to be due the Contractor, including the retained per-

centage, shall be paid to the Contractor at the office of the Owner within five days after the date of said final certificate.

Before issuance of final certificate the Contractor shall submit evidence satisfactory to the Engineer that all payrolls, material bills and other indebtedness connected with the work have been paid.

The making and acceptance of the final payment shall constitute a waiver of all claims by the Owner, other than those arising from unsettled liens, from faulty work appearing after final payment or from requirement of the Specifications, and of all claims by the Contractor, except those previously made and still unsettled.

If after the work has been substantially completed, full completion thereof is materially delayed through no fault of the Contractor, and the Engineer so certifies, the Owner shall, upon certificate of the Engineer, and without terminating the Contract, make payment of the balance due for that portion of the work fully completed and accepted. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

Article 6. The Contract Documents—The Scope of the Work, the General Conditions, the Special Conditions, the Specifications and the Drawings, together with this Agreement, form the Contract, and they are as fully a part of the Contract as if hereto attached or herein repeated.

The following is an enumeration of the Drawings:

Drawing Number	Title Nash Garage	Date
BCG 1	—Foundation Revision	4- 5-50
BCG 2	—Plan	7- 5-50
BCG 3	—Sections and Elevations	7- 5-50
BCG 4	—Elevations	7- 5-50
BCG 5	—Miscellaneous Structural Details	7- 5-50
BCG 6	—Roof Plan and Details	7- 5-50
BCG 7	—Roof and Lintel Details	8- 8-50
BCG 8	—Marquee Plan and Details	8-21-50
BCG 9	—Electrical Plan and Details	8-21-50
BCG 10	—Mechanical Plan and Details	8-22-50

In Witness Whereof the parties hereto have executed this Agreement, the day and year first above written.

/s/ BURTON E. CARR,
Owner.

/s/ VICTOR F. GOTHBERG,
Contractor.

/s/ TOM E. ANDERSON,
Witness;

/s/ W. D. CUDDY,
Witness.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed June 7, 1952.

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT OF BURTON E. CARR, DEFENDANT

Comes now the plaintiff above named and for answer to the defendants' cross-complaint admits, denies and alleges as follows:

I.

Answering Paragraph I of the first cause of action of said complaint the plaintiff admits that he entered into a contract in sum and substance as set forth in Exhibit A attached to defendant's cross-complaint, whereby the plaintiff agreed to do certain work for the sum of Two Thousand Five Hundred and Forty-two Dollars ($2,542.00). The plaintiff further alleges that said contract was modified to include additional and extra work whereby the defendant became indebted to the plaintiff in the sum of Four Thousand Fifty-one and 84/100 Dollars ($4,051.84), which sum is now due and owing to the plaintiff. The plaintiff denies all other allegations contained in said paragraph.

II.

Answering Paragraph II of said cause of action the plaintiff admits the allegations therein contained.

III.

Answering the allegations in Paragraph III of said cause, plaintiff denies each and all of the allegations therein contained.

IV.

Answering Paragraph IV, the plaintiff admits that payment upon the contract, between the plaintiff and the defendant, of the total sum of $34,605.00 has been made, but denies all of the other allegations in said paragraph contained.

Second Cause of Action

I.

Answering Paragraph I of the second cause of action of the defendant, Burton E. Carr, the plaintiff denies each and all of the allegations in said paragraph contained.

Wherefore, having fully answered the cross-complaint of the defendant, Burton E. Carr, the plaintiff prays that the defendant take nothing thereby; that the plaintiff be awarded his costs incurred in defending said cross-complaint, including an attorney fee to be allowed by the Court.

PLUMMER & ARNELL,

By /s/ E. L. ARNELL,

Attorneys for Plaintiff.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed June 25, 1952.

[Endorsed]: No. 13,959. United States Court of Appeals for the Ninth Circuit. Victor Gothberg, an Individual, Doing Business as Gothberg Construction Company, Appellant and Appellee, vs. Burton E. Carr, Jane Doe Carr, His Wife; Jack Akers and Sherman Johnstone, Appellees and Appellants. Supplemental Transcript of Record. Appeals from the District Court for the Territory of Alaska, Third Division.

Filed August 5, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 13,959

IN THE

United States Court of Appeals

For the Ninth Circuit

VICTOR GOTHBERG, an Individual doing business as GOTHBERG CONSTRUCTION COMPANY,

Appellant and Appellee,

vs.

BURTON E. CARR, JANE DOE CARR, his wife, JACK AKERS and SHERMAN JOHNSTONE,

Appellees and Appellants.

On Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLANT.

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JURISDICTION.

This is an appeal taken from a final judgment in favor of appellant filed and entered in the District Court for the Territory of Alaska, Third Judicial Division, on the 10th day of April, 1953. (R. 79.)

The District Court had jurisdiction in this proceeding by virtue of the provisions of Sections 53-1-1,

53-2-1, and 53-2-4, Alaska Compiled Laws Annotated 1949, and 48 U.S.C.A., Sec. 101.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of said appeal by virtue of the provisions of Section 1291 of Title 28 of the United States Code, (as amended Oct. 31, 1951, c. 655, Sec. 48, 65 Stat. 726). This appeal is governed by Section 1294 of Title 28 of the United States Code (June 25, 1948, c. 646, 62 Stat. 930, as amended Oct. 31, 1951, 65 Stat. 727).

STATEMENT OF THE CASE.

On May 24, 1950, appellant entered into a contract (Appellant's Exhibit 1) with appellee (Burton E. Carr) for modification of an existing foundation located upon appellee's property. The scope of the work required under this contract was governed by Appellant's Exhibit 3. The agreed price of this work was $2,542.00, for which appellant sought recovery on his first cause of action stated in his amended complaint (R. 23).

While appellant was engaged in performance of the contract (Appellant's Exhibit 1) additional labor and materials were furnished in the installation of a furnace room at the rear of the building in accordance with a modified plan (Appellant's Exhibit 4-D). Appellant's charge for this additional work was $1,459.84, as set forth in his amended complaint (R. 24).

Then on September 19, 1950 appellant entered into a second contract (Appellant's Exhibit 2) with appellee for the erection of a building upon the foundation which had been completed. The contract (Appellant's Exhibit 2) included certain plans and specifications (Appellant's Exhibit 6) which governed the scope of Appellant's work. The completion date specified in the contract was December 1, 1950, but this date was extended at least until January 13, 1951, and appellee, without formal acceptance, entered into possession of the building on February 15, 1951. On that date, only minor finishing work remained to be completed. The contract price agreed upon was $38,450.00, all of which was paid by appellee except the sum of $3,845.00. This balance was the basis of appellant's third cause of action (R. 25-26).

During construction of the building, appellant furnished certain additional labor and materials in doing the rough-in carpentry in the showroom area of the garage. This additional work was done under Section SW1 of the contract (Appellant's Exhibit 2) and appellee was charged therefor the sum of $5,351.74, which is the sum for which appellant seeks recovery in his fourth cause of action.

In addition to the extra carpentry work done in the showroom, several changes and additions to the contract (Appellant's Exhibit 2) were approved by Lorn E. Anderson, appellee's agent and engineer. These changes and additions were set forth in Ap-

pellant's Exhibit 7. Appellant's claim for this additional work is contained in his fifth cause of action.

Appellant, upon his first cause of action, sought recovery of the contract price of $2,542.00. Upon his second, fourth and fifth causes of action appellant sought recovery upon the basis of the reasonable value of the labor and materials furnished. Upon this third cause of action, appellant relied upon substantial performance of the contract (Appellant's Exhibit 2).

Appellee denied liability upon all of appellant's claims and defended upon the ground of defective workmanship and cross-complained for damages alleged to have resulted therefrom.

The trial by jury resulted in the return of two verdicts. Verdict number one was in favor of the appellant in the amount of $14,250.82, and verdict number two awarded appellee the sum of $8,131.63. Upon these verdicts judgment was rendered in favor of appellant for $6,119.19. From this judgment, following motions by both parties, this appeal is taken.

ARGUMENT.

I.

APPELLANT, AS A MATTER OF LAW, WAS ENTITLED TO A DIRECTED VERDICT UPON HIS FIRST, SECOND AND FIFTH CAUSES OF ACTION SET FORTH IN HIS AMENDED COMPLAINT. MOTION FOR SUCH DIRECTION WAS MADE AT THE CLOSE OF ALL THE EVIDENCE (R-738-739).

Rule 50(a), Federal Rules of Civil Procedure, requires that such motion shall state the specific grounds therefor. This rule was complied with by appellant when he stated:

> "* * * upon the grounds that the defendant has not presented a valid defense to any of these causes of action and such evidence that the defendant has presented does not support the defenses pleased (pleaded) in his answer and cross complaint. There is no evidence before the Court or the jury on behalf of the defendant which refutes or denies that plaintiff is not entitled to recover." (R. 739.)

The foregoing specification of the grounds upon which said motion was based is sufficient. In the case of *Ryan Distributing Corporation v. Caley*, 147 F. (2d) 138, the Court, at page 140, held a similar specification sufficient under Rule 50(a).

In that case, the defendant challenged the ruling of the Court because the case presented a question of fact. The Court, admitting that a question of fact was involved, stated:

> "But in any question of fact, 'a verdict will normally be directed where both the facts and the inferences to be drawn therefrom, as sup-

ported by the overwhelming weight of the evidence, point so strongly in favor of one party or the other that the court feels reasonable men could not possibly come to a contrary conclusion'."

Ryan Distributing Corporation v. Caley, (Third C.C.A., 1945), 147 F. (2d) 138, Cert. Denied, 325 U.S. 859.

In another case in which the propriety of a directed verdict was discussed, this Court stated:

" 'The test, as to whether a directed verdict should be granted, is not whether the evidence brings conviction in the mind of the trial judge; it is whether or not the evidence to support a directed verdict as requested was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain the verdict for the opposing party.' O'Brien, Manual of Federal Appellate Procedure, 3d Ed., p. 15. Respecting the power of the trial court to grant or deny a motion for a directed verdict, the Supreme Court of the United States stated in Gunning v. Cooley, 281 U. S. 90, 91, 50 S. Ct. 231, 233, 74 L. Ed. 720, as follows:

'When on trial of the issues of fact in an action at law before a Federal Court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party.'

> A mere scintilla of evidence is not enough to require submission of an issue to a jury."
>
> *Deere v. Southern Pac. Co.* (9th C.C.A. 1941), 123 F. (2d) 438, 440.

The Supreme Court, in a recent case, reviewing the duty of a Court with respect to directing a verdict, stated:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the Court should determine the proceedings by non-suit, directed verdict, or otherwise, in accordance with the applicable practice without submission to the jury; or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." Citing cases, at page 479.
>
> *Brady v. Southern Ry. Co.,* 320 U.S. 476.

Appellant urges, upon the record, that the Court erred in denying the motion for directed verdicts upon the three specified causes of action. Upon those causes, appellant's right of recovery is supported by the weight of the evidence. This conclusion is supported most forcefully by appellee's testimony and admissions contained in the record (R. 312, 319, 320, 323, 358-367). In fact, this testimony of the appellee conclusively confirms appellant's right to recover: (a) $2,542.00 upon the First Cause; (b) $1,459.84 upon the Second Cause; and (c) $3,925.00

upon the Fifth Cause, all as reflected in Appellant's Exhibit 8 (R. 123), Exhibit 9 (R. 125) and Exhibit 11 (R. 128-132).

Denial of appellant's motion constituted reversible error.

II and III.

Points II and III of Appellant's Statement of Points (R. 82), for purposes of brevity, will be presented and discussed together.

POINT II CHALLENGES THE COURT'S RULING DENYING APPELLANT'S MOTION TO DISMISS THE APPELLEE'S CROSS-COMPLAINT (R-739).

POINT III URGES THAT ERROR OCCURRED WHEN THE COURT ENTERED JUDGMENT IN FAVOR OF THE APPELLANT IN ACCORDANCE WITH VERDICTS 1 AND 2 (R-79) FOR THE REASON THAT SAID VERDICTS WERE NOT SUPPORTED BY THE EVIDENCE AND WERE CONTRARY TO LAW.

Appellant's amended complaint (R. 23-27) presents five causes of action.

The first is based upon written contract, dated May 24, 1950 (Appellant's Exhibit 1) and seeks recovery of $2,542.00, the agreed price. The scope of the work required under this contract is governed by Appellant's Exhibit 3. Appellant's proof establishes conclusively that this contract was performed (R. 97), and that payment was not made either for the direct contract work or the extra work (R. 99-102). Appellee's testimony as to payment relates only to the contract dated September 19, 1950 (R. 213-216).

Appellant's second cause of action is based upon a claim for "extras" furnished in connection with revision of the furnace room at the rear of the building in accordance with Appellant's Exhibit 4-D. Appellant testified (R. 98-99) regarding the nature of the extra work that resulted from the modification. Appellant's Exhibit 5 was then admitted into evidence, and appellant testified he had not been paid any portion thereof (R. 101). Upon cross examination appellant testified that the boiler room costs were not included in the work required under the first contract (Exhibit 1) or the second contract (Appellant's Exhibit 2) (R. 139-146).

Upon cross-examination, appellee Carr admitted that the plans were revised to provide for construction of the boiler room inside, (R. 319), and that such work constituted an extra (R. 320). Carr then testified "I admit I owe him some—but not $1600.00". (R. 323.)

Witness Rivers (R. 547) estimated this work at approximately $1800.00.

Witness Anderson (R. 619) testified that appellant's charge therefor was reasonable.

Appellant's third cause of action (R. 25-26) seeks recovery of the balance due upon the main contract (Appellant's Exhibit 2). Appellant testified (R. 131-132) that all work upon the main contract was done, with the exception of minor finishing. Appellant testified (R. 707) that the contract was 99% com-

plete when appellee moved in and took possession of the building.

Appellant's fourth cause of action (R. 26) was based upon extra work performed at the request of appellee. This extra work consisted of additional carpentry work in the showroom and included the labor and materials furnished (R. 103-104). With respect to these extras, Appellant's Exhibit 6, Section SW1, specifically provided that interior finish work was not included within the terms of the main contract. (Appellant's Exhibit 2) (R. 185). Upon cross-examination, appellee Carr (R. 326-329) admitted that appellant was not required to do any finish carpentry. Upon further examination, appellee admitted (R. 334-335) that the cost of the rough inside carpentry in the showroom was about $5,500.00. Appellant's final claim, as set forth in the amended complaint (R. 26) for this work was $5,371.74.

The witness, Lorn E. Anderson, engineer, representing appellee, testified (R. 623-624) that a charge of $5,000.00 for this extra work would be fair and reasonable.

Appellant's fifth cause of action (R. 27) is based upon a claim for extras amounting to $3,925.00, which were furnished beyond the scope of the original contract (Exhibit 2). This claim is predicated upon change orders authorized by appellee's engineer, Lorn E. Anderson (Appellant's Exhibit 7). Appellant testified, in support of this claim, that all materials and labor were furnished (R. 113-128). This testi-

mony is corroborated by that of witness Anderson (R. 626-629) and also by the testimony of appellee (R. 358-366). Appellant's Exhibit 11 reflects the charges that were made for this extra work.

Appellee's cross-complaint should have been dismissed in accordance with appellant's motion (R. 739) at the conclusion of the evidence. Testimony of the appellant and appellee in relation to the issues raised by such complaint is conflicting. Appellant testified (R. 131) that the work was finished, except, as he said:

"There is some small items to be done. * * *"

He further testified (R. 707) that the contract (Exhibit 2) was approximately 99% complete. Nearly all of appellee's testimony relates to claims for alleged damages (R. 230-261).

Mr. Cupples, a witness called by both parties, testified (R. 274-275) that erection of the block walls had been done in accordance with accepted practices and that there had been no visible shifting.

Mr. Rivers testified (R. 531-533) that the blocks, being furnished by appellee, would be his responsibility. This same witness, in relation to the workmanship on the floor, testified (R. 550-552) that rehabilitation of the floor, if done one way, would cost $5,000.00 and if done another would cost about $3,500.00. Upon the issue of poor workmanship of the floor, witness Taylor (R. 600-603) testified that the rehabilitation work recommended by Mr. Rivers

(R. 550-552) could be accomplished at a price not exceeding $1.00 per square foot.

Appellee's proof in support of his cross-complaint was not sufficient to support Verdict number 2. The testimony in support of appellee's complaint is based upon an estimate of damages. The only possible evidence upon which the verdict might be sustained is that of Victor C. Rivers (R. 550-552). Neither the appellee, nor any of his other witnesses, corroborated this testimony in any manner.

In an analogous case, *Lease v. Corvallis Sand & Gravel Co.,* 185 F. (2d) 570, similar testimony was the basis of an award. This Court, at page 577, stated:

> "While what we have said is sufficient to dispose of the case and to disclose that no action existed, we believe we should further state that, in our opinion, even if a cause of action had been proven, there was no evidence upon which substantial damages could be awarded. The damages awarded were based exclusively upon an estimate of damage furnished by the witness, Gallagher, as a part of his testimony * * *" (p. 577).

This Court then held that the plaintiff in that action was not entitled to recover.

All of the testimony in support of appellee's cross-complaint is in the form of estimates, and therefore does not support the jury's verdict in favor of the appellee. See

J. P. Anderson Co. v. Gold Medal Candy Corp., (U.S.D.C., E.D. New York), 93 F. Supp. 909;

United States Naval Academy Alumni Assn., et al., v. American Pub. Co. (Court of Appeals, Maryland, 1950), 72 Atl. (2d) 735.

Appellant urges that the judgment (R. 79) of the District Court was contrary to the evidence before the Court. Upon all evidence, appellant was entitled to recover the entire amount namely $17,174.16, sought by his amended complaint (R. 23-28) rather than the sum of $14,250.82, awarded under Verdict 1.

Appellee's cross-complaint related not to items by way of set-off which were not, but should have been, performed under the terms of the original contract. Instead, appellee's cross-complaint is based upon the theory of damages for faulty workmanship and inferior materials. Appellant's proof as to his first, second, fourth and fifth causes of action of the amended complaint establishes adequately that the work was performed and that the amount charged therefor was reasonable. All of these causes of action are based upon the theory of quantum meruit.

Appellant's third cause of action is based upon the theory of substantial performance of the contract. The evidence in the record likewise sustains appellant's contentions upon this cause of action.

Thus, the District Court erred in entering judgment based upon the verdicts (R. 70-71) returned by

the jury. All that was required of appellant, to sustain his amended complaint, was a preponderance of the evidence.

Deutsch v. Hoge, et al. (U.S.D.C., N.D. Ohio), 94 F. Supp. 33, Aff'd 185 F (2d) 259;
17 *C.J.S.,* Sec. 603, page 1250.

Appellant urges that he sustained his burden of proof by a preponderance of the evidence. (R. 97, 99-102, 98-99, 131-132, 139-146, 147-152, 213-216, 319, 320, 323, 326-329, 334-335, 358-366, 428-429, 619, 623-624, and 707.)

A case in which a verdict was directed in favor of the plaintiff is that of *Princess Furnace Co. v. Virginia-Carolina Chemical Co.,* 215 F. 329. There a verdict for the plaintiff was directed upon defendant's breach of contract. The Court, at page 333, stated:

> "* * * In other words, the breach of the contract was established, and the liability of the furnace company to respond in damages followed the consequence."

The Court went on to say, referring to defendant's contentions:

> "But this is not a case, like an action for personal injuries, where the damages are uncertain because they depend upon the differing judgments which may be formed upon facts and circumstances, which it is the province of a jury to consider. This is an action for breach of contract, and, the breach having been proven, the damages of the injured party became a mere matter of cal-

culation from definite and certain data. Assuming that the furnace company defaulted, as we hold to be established, there was exact and uncontradicted proof both as to the aggregate losses of the chemical company and the date each loss occurred." (At page 333.)

Princess Furnace Co. v. Virginia-Carolina Chemical Co. (4th C.C.A. 1914), 215 F. 329.

Appellant contends that his proof upon each of his causes of action is sufficiently clear and uncontradicted to have justified the direction of a verdict in his favor.

In the case of *Galloway v. United States,* the Supreme Court, in an action upon a war risk insurance policy in which a directed verdict had been entered in favor of the government, discussed the duty of the trial Court with respect to directed verdicts and said:

"* * * Nor is the matter greatly aided by substituting one formula for another. It hardly affords help to insist upon 'substantial evidence' rather than 'some evidence' or 'any evidence' or vice versa. *The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."* At page 395.

Galloway v. United States, (Sup. Ct., 1942), 319 U.S. 372.

Appellant contends that appellee's defenses to this action were not sufficiently proven to prevent recovery of the full amount sought by appellant.

Furthermore, the jury reaching its decision, upon Verdict 1, is indicative that appellant established his case. Likewise, this verdict implies a finding that appellant endeavored in good faith to perform fully the terms of his contract.

The case of *Howard v. Dickson, et al.,* (S.C. Iowa, 1914), 149 N.W. 69, is a case analogous to the issues of this appeal. There plaintiff sued upon a contract for the digging of wells, the defendants defending upon a different contract and counterclaiming for materials furnished. The Court said:

> "* * * They disagree as to the terms of the contract and this disagreement was as to each contention, supported by some proof, requiring submission of the issue to the jury. The finding that plaintiff was entitled to recover necessarily, under the issues and instructions, was also a finding that plaintiff had established the contract as claimed by him."
>
> *Howard v. Dickson et al.,* (Sup. Ct., Iowa, 1914), 149 N.W. 69 at 70;
>
> *Morello v. Levakis* (Sup. Ct., Mass., 1936), 200 N.E. 271.

Upon the theory of these cases, appellant was entitled to a verdict or judgment for the full amount of his claims.

Appellee, during the course of the trial, urged that appellant was not entitled to recovery, inter alia,

because the contract was not completed in accordance with its terms. The testimony (R. 131-132, 707) supports appellant's theory of substantial performance in his third cause of action. Likewise, the record establishes that appellant was not promptly paid by appellee for the work as completed. Appellee, at no time until after this action was commenced, complied with the contract provisions (Appellant's Exhibit 2) relating to withholding payment for defective work. Appellant, therefore, did not abandon the contract and was entitled to refuse final completion and seek recovery upon his various claims.

In the case of *Phoenix Tempe Stone Co. v. DeWaard,* contentions there made by the defendant were similar to appellee's here. There this Court said:

> "* * * The facts pleaded bring the case within the rule that, where an act of the defendant renders complete performance of the contract impossible, the plaintiff may treat the act as a discharge from further performance, and may claim compensation for what has been done, and the damages which have been sustained."
>
> *Phoenix Tempe Stone Co. v. DeWaard,* (9th C.C.A., 1927), 20 F. (2d) 757 at 759;
>
> *United States v. Behan,* 110 U.S. 338, 28 L. Ed. 168;
>
> 3 *Elliott on Contracts,* 218.

Appellant, therefore, was entitled to recover in full the amount of $17,174.16, sought in his amended complaint (R. 27). Notwithstanding Verdicts 1 and 2, the District Court should have entered judgment in

that amount, less the amount of Verdict 2, if such verdict were allowed to stand.

IV.

THAT THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT, NOTWITHSTANDING THE VERDICTS OR IN THE ALTERNATIVE FOR A NEW TRIAL FOR THE REASONS:

(a) THE VERDICTS ARE INCONSISTENT.

(b) VERDICT NO. 1 IS CONTRARY TO THE EVIDENCE AND APPELLANT IS ENTITLED TO RECOVER THE FULL AMOUNT OF HIS CLAIM.

(c) VERDICT NO. 2 IS INCONSISTENT WITH VERDICT NO. 1, AND APPELLEE IS NOT ENTITLED TO RECOVER AGAINST APPELLANT.

The general rule applying to verdicts rendered under the Federal Rules of Civil Procedure is set forth in 9 Cyclopedia of Federal Procedure (3rd Edition) p. 442:

> "The verdict must be responsive to issues and the nature of the action, and should not conform to an improper prayer in the declaration of complaint. It is not responsive, if for an amount other than that recoverable, if any thing is recoverable, or if it finds upon only part of the issues submitted, or if it leaves the case undecided as to some of the subjects of the action * * * The verdict must be certain, enough to enable the court to reduce it to form, if informal, and consistent in its several awards and findings * * * The verdict should follow and conform to the instructions, even if erroneous, and disregard

of them is ground for a new trial or reversal, unless it can be said that no prejudice resulted."

Thus in *East St. Louis Cotton Oil Co. v. Skinner Brothers Mfg. Co.* (C.C.A. 8th, 1918) 249 Fed. 439, where defendant counterclaimed in an action for material furnished and labor performed, asserting plaintiff's breach of an alleged contract to install a ventilating system for an agreed price, while plaintiff asserted that no contract price had been fixed, a verdict for plaintiff, which also awarded damages to defendant on its counterclaim, was held inconsistent with itself and could not sustain a judgment based on the verdict. The verdict returned by the jury read:

"We, the jury in the above-entitled cause, find the issues herein joined under the petition of plaintiff in favor of said plaintiff, and we find that defendant is indebted to plaintiff by reason of the account stated in said petition in the sum of forty-five hundred and ninety-four and 79/100 ($4,594.79) dollars. We further find the issues herein joined under the counterclaim of defendant in favor of said defendant, and we assess the damages of defendant under said counterclaim at the sum of one thousand and 00/100 dollars."

The Court declared, at page 442:

"The question as to whether the verdict supports the judgment is a question of law, which appears on the face of the record without a bill of exceptions. Such questions may be assigned as ground of reversal, although no exception is taken."

The verdicts in the instant case on appeal do not support the judgment. The two verdicts rendered were (R. 767-768):

> "Verdict No. I. We, the jury, duly sworn and impanelled to try the above-entitled cause, do find for the plaintiff and against the defendant, and do further find that the plaintiff is entitled to recover of and from the defendant the sum of fourteen thousand two hundred fifty and 82/100 ($14,250.82) dollars, together with interest thereon at the rate of six per cent (6%) per annum, from the 1st day of March, 1951.
>
> Verdict No. II. We, the jury, duly sworn and impanelled to try the above-entitled cause do find for the defendant and against the plaintiff, and we do further find that the defendant is entitled to recover of and from the defendant the sum of eight thousand one hundred thirty-one and 63/100 ($8,131.63) dollars, together with interest thereon at the rate of six per cent (6%) per annum from the 1st day of March 1951."

These verdicts were rendered in direct contravention of the instructions of the trial judge, who instructed the jury (R. 752 and 760):

> "* * * if you find from the evidence that the defendant is entitled to recover from the plaintiff damages arising from the failure of plaintiff to do the work and furnish the materials specified in the contracts, whether written or oral, then such damages should be deducted from any amount which you might find otherwise due to the plaintiff, and if those damages exceed the

amount, if any, which you might find would otherwise be due the plaintiff, a verdict should be rendered in favor of the defendant for the balance * * * If you find for the plaintiff and against the defendant you will insert in the verdict which has been prepared for that contingency and which is marked 'Verdict No. I' the sum which you find that the plaintiff is entitled to recover of and from the defendant, and your foreman will thereupon date and sign that verdict and you will return the same into Court as your verdict.

Similarly, if you find that the plaintiff is not entitled to recover any sum whatsoever against the defendant and that the defendant is entitled to recover from the plaintiff, you will insert in the form of the verdict which has been prepared for that contingency and which is marked 'Verdict No. 2' the amount which you find the defendant is entitled to recover of and from the plaintiff, and your foreman will thereupon date and sign that verdict and you will return the same into court as your verdict."

The trial Court instructed that one verdict could be returned instead of two, two were returned in violation of the instructions. The instructions "constituted the law of the trial. The jurors were bound to follow them". *American R. Co. of Porto Rico v. Santiago,* 9 F. (2d) 753 at 757 (C.C.A. 1st, 1926): 9 Cyclopedia of Federal Procedure (3rd Edition) 442, ***supra.***

V.

THAT THE COURT ERRED IN ADMITTING OVER APPELLANT'S OBJECTION, IN EVIDENCE, APPELLEE'S EXHIBIT "T" FOR THE REASON THAT THE SAID EXHIBIT WAS NOT PART OF THE CONTRACT BETWEEN THE PARTIES AND WAS INCOMPETENT AND PREJUDICIAL.

Appellee introduced, over appellant's objection, into evidence Defendant's Exhibit "T" (R. 715) which was structural steel plan indicated that a marquee built by the appellant as an extra, had been pencilled in by a Mr. Anderson, the architect and engineer for appellee. There was no evidence that the appellant had ever seen this plan, or that it was part of any plan on which the appellant based his bid (R. 726). The record reads (R. 715):

> "Mr. Arnell. We wish to renew our objection on the grounds that it is incompetent. There is no showing that Mr. Gothberg ever saw it, or that it was a part of any plans upon which he based his bid.
>
> Court. The objection is sustained.
>
> Mr. Bell. Exception.
>
> Court. The exception is noted. I think the ruling was erroneous. It was shown to Mr. Anderson and he knew about it when he drew the plans and specifications, and it may conceivably have some value. The objection is overruled, and it may be admitted."

The record indicated that Mr. Anderson was not an employee of appellant, but was hired by appellee, Carr. Mr. Anderson had previously testified that (R. 613):

"A. I was employed by Mr. Carr to design the garage, or I should say, complete the design of a garage that he was building on Fifth Avenue and Denali Street. It consisted actually of two parts—one part was for a change in the foundation that had already been built, and the second part was for completion of the structure."

And that (R. 615):

"Q. How long, Mr. Anderson, did you serve as architect, or inspector, of this job for Mr. Carr?

A. I was working as Mr. Carr's representative up until about January 20, 1951."

And that (R. 617):

"the construction of the marquee was extra work or a 'change' in addition to the contract.

* * * there is another change. We provided for a second window and there is a door in that area. In order to make the wall structurally sound, it was necessary to pour concrete columns and a spandrel beam to hold up the blocks above it and also to hold the marquee."

The appellee, Carr, had already testified that he had hired and paid Mr. Anderson to prepare to design the garage and draw the plans (R. 204):

"Q. Then did you employ Mr. Anderson on the recommendation of Mr. Gothberg?

A. Well, there is a Mr. Anderson—and then there is a Mr. Smith in there too, the two together—but Lorn Anderson was a registered

engineer, and Mr. Smith—I don't know—but Smith did the most of the talking."

And (R. 205):

"Q. How much did you pay this engineer to draw those plans?

A. It cost me $2,700.00—and my understanding was it would be between five and six hundred dollars—I paid for it.

Q. And when you got the bill it was for $2,700.00?

A. Better than twenty-seven hundred and some odd dollars."

It is obvious from the foregoing testimony that Mr. Anderson was the agent and employee of appellee, Carr, (by Carr's own admission) and any agreement concerning an amendment of the plans, as indicated by Exhibit "T" was hearsay and an inadmissible self-serving declaration. In *Perkins v. Haskell,* 31 F. (2d) 53, (C.C.A. 3rd 1929) dismissing appeal (D.C.), *Haskell v. Perkins,* 28 F. (2d) 222, and certiorari denied, 49 S.Ct. 513, 279 U.S. 872, 72 L.Ed. 1007, the Court declared, at page 64:

"What the plaintiff said and wrote, not to Duke, but to the persons engaged in making the investigation, and, indeed, in several instances, what he said to strangers, were inadmissible under the familiar rules against self-serving declarations. What the several investigators said and wrote to the plaintiff and to one another, and what they did in the progress of their employment, admitted in evidence to prove the character and terms of

an alleged contract between Haskell and Duke, were not valid evidence of such contract, and did not bind Duke, in the absence of evidence showing they were speaking and acting as his agents in respect to the making of a contract. Witnesses not present when it is alleged a contract was made on July 18 manifestly cannot be heard to say what contract, if any, was then made in their absence; nor can their later words and acts unless shown to have been authorized by Duke, vary the terms of the undertaking then reached, and develop it into a full-grown contract embodying terms not then broached. It was, we think, mainly by this evidence, inadmissible in the first instance, and when submitted, given a value it did not possess, that the jury was moved to its verdict."

In admitting, over appellant's objection, Appellee's Exhibit "T", the trial Court could have only admitted the exhibit on the theory that Mr. Anderson was the agent of appellant, and that acceptance of the plan by Mr. Anderson bound appellant. No proof of such agency was adduced. In fact, it was necessary to adduce more than mere proof of agency. It was necessary to show that Anderson had general authority as such agent to make substantial changes in the plans. *Gratz v. McKee,* 9 F. (2d) 593 (C.C.A. 8th 1925).

VI.

THAT THE COURT ERRED IN PERMITTING, OVER APPELLANT'S OBJECTION, THE APPELLEE AND HIS WITNESSES TO TESTIFY CONTRADICTORY TO THE TERMS OF THE WRITTEN CONTRACT BETWEEN THE PARTIES.

The appellee introduced Victor C. Rivers as a witness who identified a report prepared by the witness. The report was an "analysis of the plans and specifications and contract documents and appraisal of the building" which was the subject matter of this action (R. 498). Appellant objected to it, initially, on the grounds that it was not the best evidence (R. 499). The testimony of the witness, Rivers, who was qualified as an expert witness in the field of engineering was not limited to testimony of his findings on inspection of the building after the controversy arose. The witness testified that certain work actually performed by the appellant, based upon witness' examination of the contract, was included in the terms of the contract and was not properly chargeable as "extras". The attempt to indicate by the witness' testimony the "cost" of performing certain work contracted for, was, initially, precluded by the trial Court. The Court said (R. 558):

> "Court. The objection is sustained. There is a contract for $2,542.00 to do that precise work * * *"

Appellee asserted that he desired the witness to prove by the expert that the work was included in the contract and was only worth at most $400.00 (R. 558, 560).

Appellant objected saying that (R. 559):

> Mr. Arnell. I propose that that is incompetent for the reason that the contract is in evidence. This man is not qualified to testify as to what the terms of that contract were intended to include. The contract before the court, also the specifications, state that the footings and the foundation in the boiler room was in at the time this contract was signed on September 19, 1950."

But the trial Court finally admitted the testimony (R. 563):

> "Q. Now, Mr. Rivers, as an engineer, if the second contract provided to build the building and everything covered by the plans and specifications, would that include the stairway and stairwell into the boiler room?
>
> Mr. Arnell. If your honor please, I wish to interpose an objection on the grounds that the question is incompetent. Although Mr. Rivers is an expert, he can't answer upon the basis of an estimation, or guess, as to what this contract did or did not provide. Therefore, I think the question is improper.
>
> Court. He is testifying as an expert upon the plans and specifications. I think the question may be answered. The objection is overruled.
>
> A. Inasmuch as this drawing is a part of the contract documents, and the details and general information as shown here, I would interpret the plans to mean that the contractor was obligated to perform the work.
>
> Q. As a part of the contract, Mr. Rivers?
>
> A. As a part of the contract.

Q. Then if he were obligated to perform it as a part of the contract, it would not be a proper extra would it?

A. Definitely no, unless there was some supplemental or outside agreement to that effect."

The impress of the testimony was sufficient to make the jurors question the witness (R. 565, 566, 567).

The trial Court in accepting the expert testimony of the witness, who was qualified as an engineer, permitted the witness to usurp the function of the Court and jury in determining what the contract consisted of. The error was a grave one because the witness' testimony had apparently impressed the jurors.

It was said, in one case:

"In addition, however, and apparently as a substitute for the missing witnesses, there was called as an expert witness a gentleman whose qualifications are beyond question, but who in response to hypothetical questions gave answers which, if allowable, left nothing for this court to decide. This goes far beyond the province of an expert, and is in fact usurping the province of the court, and cannot be allowed. Castner Electrolytic Alkali Company v. Davies (C.C.A.) 154 F 938; United States v. George A. Fuller Company, Inc. (D.C.) 300 F 206; Hunt v. Kile (C.C.A.) 98 F 59."

Campbell J., in *The Domira,* (D.C.E.D., N.Y. 1931), 49 F. (2d) 324 at 328, aff'd 56 F. (2d) 585 (C.C.A. 2d).

Even if it were assumed that the testimony of the witness, Rivers, was not in violation of the parol

evidence rule, none-the-less, his testimony that appellant was "obligated to perform the work" as "part of the contract" and receive no extra compensation for an "extra" violated the general rule that a witness, even if qualified to speak and render an opinion, should not render an opinion on the exact and ultimate issue which is for determination of the Court and jury. In *Hamilton v. United States,* 73 F. (2d) 357 (C.C.A. 5th, 1934) at page 358, the Court said of expert testimony:

> "Moreover, the physicians were asked the exact and entire question which the pleadings put to the jury. They might as well have been asked whether in their opinion Hamilton ought to win the case."

In the *Hamilton* case, the question put to the physicians was whether the insured was totally and permanently disabled within the meaning of the insurance. In the instant case, the witness, Rivers, was asked whether certain work was an obligation under the contract. The question permitted the witness to settle these questions of law for himself, and applying this law to his interpretation of the facts, to try the very question for which the Court sat. *United States v. Sauls,* 65 F. (2d) 886 (C.C.A. 4th 1933).

This testimony of the witness, Rivers, in substance established a new contract before the Court. The trial Court had declared the contract complete in itself. There was no contention that there was fraud, mistake, or wanton or arbitrary action on the

part of appellant. In such a case, the execution of a written contract, even though voluminous, supersedes all oral negotiations concerning its terms, and the whole engagement of the parties is presumed to have been reduced to writing. *Rajotte-Winters, Inc. v. Whitney Co.,* 2 F. (2d) 801 (C.C.A. 9th 1924). Even the testimony of an engineer, as in *Gammino v. Inhabitants of Town of Dedham,* 164 Fed. 593 (C.C.A. 1st, 1908), that it is customary when certain obstructions are "not shown on the plans or indicated as uncertain, to treat and pay for any work done thereon as extra work" is improper as contradictory of the written contract in evidence and is in violation of the rule set forth in *United States v. Fidelity and Deposit Co. of Maryland,* 152 Fed. 596 (C.C.A. (2d) 1907), at 599:

> "The rule is elementary that, where the parties have deliberately put their engagements into writing in such terms as to import a legal obligation, without any uncertainty as to the object or extent of such engagements, the writing is presumed to contain the entire contract and all the prior and contemporaneous negotiations are merged therein, and cannot be shown by parol evidence. The writing, it is true, may be read by the light of surrounding circumstances in order to more perfectly understand the intent and meaning of the parties; but, as they have constituted it to be the only and final expression of their meaning, no words can be added to it, or others substituted in place of words it already contains. The rule which precludes a resort to parol evidence to modify the terms of a written

contract in particulars, in respect to which the language is unequivocal, applies as well to the implied as to the expressed conditions. Indeed, that which is a part by implication is as much a part of the contract as though it had been fully expressed in its words. These familiar rules control the present question."

VII.

THAT THE COURT, TO THE APPELLANT'S PREJUDICE, ERRED IN EXCLUDING APPELLANT'S EVIDENCE OF CONSTRUCTION TRADE CUSTOMS AND PRACTICES RELATING TO APPELLEE'S ACCEPTANCE OF THE BUILDING BY USING AND OCCUPYING THE SAME.

Wigmore declares that:

"Where the parties have not intended to make the document embody the entire transaction upon a particular topic, its terms may be as well supplied by implied intrinsic agreement. In other words, that usage or custom of a trade or locality, which would otherwise by implication form a part of the transaction, will equally form a part when the transaction has been embodied in a document, provided the documents are not intended to cover the topic affected by the custom."

IX Wigmore On Evidence (3rd Edition) No. 2440, p. 127.

"The principle is otherwise declared in Brown v. Byrne, 3 E. & B. 703, (1854): 'In all contracts, as to the subject matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their

> agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding of; evidence therefore of such incidents are receivable. The contract in truth is partly express and in writing, partly implied or understood and unwritten."

In the instant case on appeal the appellant offered to introduce evidence of a general custom and usage existing in the building trade indicating the prevailing usage in the area in trade that an owner occupying a building being finished by the contractor accepts the building "as is" and waives any objections as to non-compliance with the building contract. Appellant testified that the building which was the subject of the contract was 99% completed when appellee moved in (R. 707). Appellant then testified that he had been in the contracting business since 1925 and engaged in such business in Alaska since 1945. Appellant was then asked (R. 709):

> "Q. Are you familiar, Mr. Gothberg, with the customs and common usages that are recognized in the contract trade, where an owner occupies a building that is in the process of construction or being finished?
>
> A. I certainly am."

Upon objection the Court ruled:

> "Court. I think the practices could not be binding upon the defendant unless it is shown that the defendant had knowledge of the practice. To say that contractors have a practice is not sufficient, and the objection is sustained."

But the Court failed to determine whether the usage was so notorious and uniform that the knowledge of such usage would be imputed to appellee. One who seeks to avoid the effect of a notorious and uniform usage of trade must show that he was ignorant of it. *Robertson v. National Steamship Co., Limited,* 34 N.E. 1053 (N.Y. 1893); *Johnson v. De-Peyster,* 50 N.Y. 666.

Dated, Anchorage, Alaska,
February 24, 1954.

Respectfully submitted,
E. L. Arnell,
George M. McLaughlin,
Attorneys for Appellant.

No. 13,959

IN THE

United States Court of Appeals

For the Ninth Circuit

VICTOR GOTHBERG, an individual, d/b/a Gothberg Construction Company,
Appellant and Appellee,

vs.

BURTON E. CARR,
Appellee and Appellant.

On Appeal from the District Court of the United States for the Territory of Alaska, Third Division.

BRIEF OF APPELLEE-APPELLANT BURTON E. CARR and ANSWER TO APPELLANT'S BRIEF AND BRIEF ON CROSS-APPEAL.

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JURISDICTION.

The jurisdiction of the District Court was invoked and authorized under the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended 48 U.S.C.A., Section 101 and Section 53-1-1, 1949 Alaska Compiled Laws Annotated. The Circuit Court of Appeals has jurisdiction in this matter by virtue of the provisions of Section 1291, Chapter 92, of the Judiciary and Judicial Procedure Act, 28 U.S.C.A., June 25, 1948, c. 646, 62 Stat. 912, Also, Section 8C of the

Act of February 13, 1925, as amended. (28 U.S.C.A. 1294.) Practice in the district Court for the district of Alaska and appeals from the judgments rendered in said Courts are all governed by the Federal Rules of Civil Procedure by virtue of 63 Stat. 445, 48 U.S.C.A. 103A.

STATEMENT OF FACTS.

This action was originally filed in the District Court, Third Judicial Division, Anchorage, Alaska, by Victor Gothberg, an individual d/b/a Gothberg Construction Company, the Plaintiff, v. Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, Defendants, by the filing of a complaint. (Tr. 3.) In the complaint, the plaintiff asked for judgment against *plaintiff* for $17,174.16, together with interest thereon at the rate of 8% from March 1, 1951, and costs and disbursements, including attorney's fees. The Court dismissed the action as against the defendants Jack Akers and Sherman Johnstone and the plaintiff filed an amended complaint (Tr. 23), in which he prayed judgment for $17,174.16, with interest, and asked for judgment against the *plaintiffs* again. To the complaint the defendant Marie Carr, who was sued as Jane Doe Carr, filed an answer (Tr. 10) in which she denied all the allegations contained in the plaintiff's complaint and prayed the dismissal of the complaint against her and that she be allowed a reasonable at-

torney's fee for the defense of the action which we will mention further on in this brief. To this amended complaint, an amended answer was filed by Burton E. Carr (Tr. 37) in which he adopted by reference all allegations in the original answer and cross-complaint filed in the action and in addition thereto, made some specific allegations to the effect that the work that was performed was so defective that the defendants owed plaintiff nothing, and did allege that he entered into a contract with the plaintiff on the 19th day of September, 1950, for the construction of a building and did agree to pay therefor when finished $38,450.00, but specifically alleged that the plaintiff never finished said building, left the same in an unfinished condition, that any law suit brought to recover on this contract, is prematurely filed because the contract has never been complied with and that he cannot maintain an action for the contract price, and that therefore he is not indebted to the plaintiff for any sum whatsoever (Tr. 38), and further alleges that the plaintiff did do some extra work on the building in the reasonable value of $2,500.00, but the defendant had previously paid the plaintiff $34,-672.57 in cash and paid bills that were the just obligations of the plaintiff and he had more than paid for all the work performed by the plaintiff for the defendant, and in the prayer of said answer, he prayed that plaintiff take nothing and that this defendant recover on his cross-complaint, the sum of $20,000.00 as set forth therein, which cross-complaint

is specifically made a part of the answer as fully as if set out and re-alleged herein in full.

For some reason, when the appellant-appellee, Victor Gothberg, had this transcript printed, he omitted the whole cross-complaint from the original answer and cross-complaint, although in the designation of the record for printing, the appellee-appellant designated as a part of the record the original answer, which was one document headed "Answer and Cross-Complaint", and was a continuation directly through the instrument. (See:—Answer and Cross-Complaint in original files.) That by the stipulation filed on the 3rd day of August, 1953, which is in the original files, it was stipulated that the original files and pleadings, including all exhibits and a full transcript of the docket entries and transcript of the evidence, be filed in the Circuit Court of Appeals in lieu of making and filing a transcript thereof, which shows conclusively that there is an omission from the printed record, the cross-complaint of the defendant, Burton E. Carr, and this appellee-appellant will petition this Honorable Court to have printed and made a part of the record this cross-complaint, as it should have been done by the appellants-appellee, Victor Gothberg, in the printing of the transcript, since there is no separation between the original answer and the cross-complaint, as may be easily seen by checking the record. By the terms of said answer and cross-complaint, originally field, to which was attached a copy of the written contract referred to,

the defendant and cross-complainant in the lower Court, who is the appellee and cross-appellant here, alleged:

a. That the plaintiff failed to comply with the terms of the two written contracts, specifications and plans in the following:

b. That the principal contract provided for the furnishing of a bond to guarantee the compliance with the terms of the contract which the plaintiff (Gothberg) never furnished even though requested so to do.

c. That the plaintiff failed to hook up the lights on the 76 pump.

d. Failed to install one globe for window light on the marquee.

e. Failed to install front window glass that would fit the opening made by the plaintiff and did cause to be installed a glass therein that is unsafe, too small for the opening and does not meet the requirements of the plans and specifications.

f. Failed to install a proper shut-off valve below the concrete in front of the building to prevent the freezing of the outside hydrant and did install a hydrant in such a sloppy, incompetent manner without shut-off so that the same froze on two different occasions causing damage to parts and requiring labor to the extent of more than $20.00 to make repairs and still there is no shut-off below the pavement in the proper position as meets the requirements of the ordi-

nances of the City of Anchorage, and the plans and specifications.

g. Inserted a charge of $500.00 and attempted to collect the same for changing a steel beam that holds the marquee, that plaintiff contracted and agreed to install in the regular contract, plans and specifications.

h. Failed to furnish and install outlet plates on electrical contacts.

i. Failed to furnish solid brass cylinder locks on the front doors.

j. Failed to install push plates and kick plates on five (5) doors as per contract.

k. Failed to furnish, install and equip two-way swinging doors between the show room and the shop as provided in the contract.

l. Failed to furnish the installation of one heating unit, with motor.

m. Failed to install three (3) thermostats in the show room as provided for in the contract and specifications.

n. Failed to install two (2) additional thermostats in the shop.

o. Failed to mount and install door frames in lead, according to the terms of the contract.

p. Failed to finish the building on the outside and allowed projecting wires to extend and has left the wall rough and uneven.

q. Failed to finish the building on the inside in a workmanlike manner.

r. Installed and laid cement blocks in freezing weather without properly protecting the wall and allowed the mortar between the blocks to freeze and the wall is dangerous and apt to disintegrate.

s. Failed to insulate the water pipes, steam pipes, and sewer pipes as provided in the contract.

t. Failed and refused to take out, reinstall and refinish one section of the cement floor in the show room which was frozen during construction and is defective and will not stand.

u. Refused to correct a condition in the floor in the boiler room so that it would drain properly even though requested to do so.

v. Failed to replace cement blocks over rear windows in shop where mortar was frozen in installing them and had fallen out over and around the windows, leaving a dangerous condition and causing a waste of heat from within.

w. Failed to properly install all of the windows of the shop—same being still loose and improperly fitted.

x. Failed to put on one coat of red lead and two coats of aluminum paint on all steel used in the building, and that the red lead and one coat of aluminum paint was never furnished or put on the steel.

y. He attempted to make an extra charge for moving the steel beam over the electric door which

beam was set in the wrong place by the plaintiff and through no fault of the defendant, and said plaintiff has constantly demanded extra pay for correcting this error in installment by him.

z. The floor in the garage was carelessly, and negligently built so that it does not drain and the work in finishing the floor was not in a workmanlike manner, but is defective and causes large pools of water to stand on the floor following the time that vehicles with snow on them or water are brought into the garage.

aa. Failed to finish the walls in the men's restroom.

bb. Refused to allow credit for 77 cement blocks saved by change in the plans after installation of the south door of the garage, which blocks were of the value of 65¢ per block.

cc. Failed to install proper exhaust pipe with swivel of a manufacturer and recognized product according to the contract.

dd. Attempted to change and refused to remove from statement for extras, the doors leading to the show room as such doors were included in the original contract and the attempt to collect for these doors was arbitrarily, capricious and without any justifiable reason.

ee. Failed to furnish and properly install, doors with closing equipment on all outside construction as required by the contract.

ff. Failed to use heavy wire mesh in gas pump lanes as called for in the specifications.

gg. Attempted to and did insist on charging for extras for installing of a hoist which was included in the contract.

hh. Failed to install the mirrors in the rest rooms.

ii. Laid cement blocks in sub-zero weather without heat or enclosures in violation of the terms and specifications of the contract, and the mortar was frozen and is soft and of no benefit, and the blocks are loose and cause the building to become unsafe.

jj. Failed to finish the building at the specified time, to-wit: December 1, 1950, and dilatorily allowed the building to be unfinished until February 24, 1951, and then the building was not finished at all and has never been finished and this defendant is entitled to recover liquidated damages of $25.00 per day from December 1, 1950, to February 24, 1951, which amounts to $2,150.00, and is entitled to recover damages at the rate of $25.00 per day from February 23, 1951, to such time as the building is finished according to the terms of the contract.

kk. That by reason of the plaintiff's failure to comply with the terms of the contract, this answering defendant has been damaged by the plaintiff to the extent of $20,000.00.

Then the defendant prayed that the plaintiff take nothing and that said defendant recover $20,000.00 on his cross-complaint.

Evidence.

Burton E. Carr, the defendant in the Court below, always contended that the building was never finished and the evidence will show that the plaintiff himself admitted that the building was not finished according to the plans, specifications and contract. The plaintiff admitted that the wire mesh was not installed in the ramp in front of the garage (Tr. 104); that the cylinder type block partition was not installed (Tr. 106); that the compressor was not installed where it was intended to be; that he attempted to charge extra for the installing of the hoist (Tr. 109); he admitted receiving the demand to finish the contract, a copy of which is attached to defendant's answer and cross-complaint; he admitted he did nothing about complying with the contract after receiving the demand (Tr. 162); admitted he agreed to furnish a bond guaranteeing the compliance with the terms of the contract; admitted he did not furnish the bond; admitted he was required to install one globe and window light on the marquee; that he did not install them (Tr. 163); admitted it was his duty to see that it was done (Tr. 164); admitted he did not install the hydrant provided for in the contract (Tr. 164); admitted he did not install the kick plates and push plates (Tr. 168); admitted he did not install the three (3) additional thermostats in the show room as provided for in the contract (Tr. 171); did not install the two (2) additional thermostats in the shop (Tr. 172); did not finish the building outside and inside (Tr. 172); did not take out and

refinish the frozen cement of the floor in the show room (Tr. 173); did not replace the blocks over the rear windows in the shop; admitted he could see daylight out through some of the cracks (Tr. 174); admitted Mr. Carr had to have the Anchorage Installation Company install the air compressor (Tr. 180); admitted he refused to furnish the itemized statement of the payroll for February, 1952 (Tr. 188 and 189); admitted he did not put the hand railing on the stairs that went down into the basement (Tr. 190); admitted there should have been a hand railing there. (Tr. 190.)

Then Burton E. Carr, the cross-appellant here was called as a witness who identified checks paid (Tr. 211 and 212); testified as to the delay in getting into the building; testified he did nothing to cause a delay; did not waive the requirement for wire mesh in the driveway; told plaintiff nothing to indicate that he would waive it; that the contractor was to furnish everything—all the labor and materials except the steel on the grounds—that defendant never at any time agreed to furnish the wire mesh; never waived the necessity for using it, never heard of the plaintiff putting in an extra sack of cement in the concrete around the pumps; testified to the violation of the contract by pouring cement (Tr. 235); the shop floor is very uneven and when it is raining, the water seems to go everywhere except down the drain; there are dips in the floor and it takes a broom to sweep it off; the caps over the drains were defective (Tr. 235, 236 and 237); in the Winter when the snow is on,

the cars coming in with snow on them naturally put water on the floor and the men cannot work unless they use a broom (Tr. 238); that the plaintiff's attempt to charge him $500.00 that he did not authorize for doing work that is in the contract, plans and specifications (Tr. 239); never agreed to pay him $500.00 for the beam, it was in the original plan (Tr. 241); he never waived the requirement of furnishing the compliance bond (Tr. 245); he told him he must have the compliance bond. There was not any wire drop to the light in the 76 pump, and that one (1) light was out all the time. He asked the contractor a number of times about it and his answer was, it was up to the electrician, and did nothing about it. He did not install the light globe in the marquee, did not put in the window light, no wire was installed so the globe could be put in (Tr. 246, 247); there was a very bad crack all the way up in the front concrete wall where he left a piece of wood in the concrete, also where he connected this foundation, he did not do it strongly and it gave away and let the building down (Tr. 248); he was supposed to put the foundation wall around six (6) or seven (7) feet deep and he put it three (3) feet down and was asked about it and he said that was as good as if it was seven (7) feet or ten (10) feet down. He presented a piece of mortar which breaks up and is soft and stated you could just scrape it off with your fingers from the blocks, that you can grab hold of it and it breaks right off, the blocks are loose (Tr. 248, 249); failed to install the shut-off valve in front of the building to prevent

the freezing of the outside hydrant, installed it in such a sloppy and incompetent manner without the shut-off so that the same froze on two different occasions causing damage to parts, and requiring labor to the extent of more than $20.00 to make repairs, and there is still no shut-off valve below the pavement in the proper position to meet the requirements of the city ordinances of the City of Anchorage as required by the plans and specifications; this valve is put up above the concrete, and he was told at the time it would not work and he said he would guarantee it to never freeze, but it did freeze and broke the valve and Mr. Carr had to put on a new one (Tr. 250); contractor-plaintiff tried to collect $500.00 for installing a beam that was provided for in the contract and specifications and was sued for in this action; he failed to install outlet plates on electrical contacts (Tr. 251, 252); that all that were put on were done by Mr. Carr or his employees; the contractor failed to furnish solid brass cylinder locks in the front doors; Mr. Gothberg said they were not available and put on bathroom locks or back-door locks which were very cheap locks (Tr. 252); he left big holes in the front doors; Mr. Carr paid $45.00 for locks to put in and was given no credit therefor, the doors were left weak and patched and were thin in the first place, he failed to install push plates and kick plates on five (5) doors as per contract (Tr. 253); he failed to furnish, install and equip two-way swinging doors between the show room and the shop as provided for in the contract; failed to furnish and install one (1)

heating unit with motor (Tr. 254, 255); failed to install three (3) thermostats in the show room as provided for in the contract and specifications; failed to install two (2) additional thermostats in the shop (Tr. 256, 257); failed to mount and install the door frames in lead according to the terms of the contract, failed to finish the building on the outside and allowed projecting wires to extend, and left the wall rough and uneven (Tr. 258); he failed to finish the inside of the building, the walls are rough on the inside and it does not look good (Tr. 260); there are cracks in the building at the present time, several on the East wall running diagonally off the corners (Tr. 269); the red lead and one (1) coat of paint were left off, only one coat of paint was put on, and the steel is starting to rust; he told Mr. Gothberg about the condition and he promised to check into this rust, but did nothing (Tr. 293); the concrete floors are all uneven and have to be removed to be made satisfactory and the wiring inside is not finished on the walls, the ladies' and men's restroom walls called for finished carpentry work and they are ugly, block walls, unfinished (Tr. 294, 295); he failed to insulate the steam pipes and sewer pipes as provided in the contract and most of them are not insulated at all, none of the pipes were painted and the specifications call for painting the pipes before installation and none of them were painted; he failed to take out and reinstall a section of the cement in the show room which had frozen during construction, it is defective and will not stand (Tr. 297); many coats of paint have been put

on this bad cement floor by Carr trying to cover it up, but it is still too rough to hold any of the tile blocks that we were putting on there. The contractor refused to correct a condition in the floor of the boiler room so that it would drain. It was necessary to go in to the boiler room every so often to draw off the muddy water and had to clean the boiler regularly, all the water runs to the side of the stairway and there is at least 1½″ to 2″ of water in the boiler room. This was brought to the attention of the contractor many times (Tr. 297, 298); that the contractor refused to replace the cement blocks over the rear windows in the shop where the mortar was frozen in installing them and had fallen out over and around the windows leaving a dangerous condition and causing a waste of heat from within. You can stand there and look out through the walls of the building and see light through it. There are several places upstairs, if you look, you can see right through to the outside (Tr. 299); windows in the shop are still loose and improperly fitted, the bottom part of the windows wiggle back and forth (Tr. 300); he did not finish the walls in the men's restroom, refused to allow credit for seventy-seven (77) cement blocks at 65¢ per block. He hauled the blocks away, failed to install proper exhaust pipes with swivels of a manufactured and recognized product according to the contract and he put up a home-made deal which would break off and we have quit using it altogether (Tr. 302); tried to charge for and refused to take off of the statement, for extra doors leading to the show room, all of the

doors were included in the original contract, no justifiable reason was given for trying to make the extra charge. There was supposed to be a fire wall between the office and the other part of the building and he did not put in the block wall but used lumber, and that is where the doors are supposed to come in, and in that place the doors are just one-way doors and should have been swinging doors with all the proper hardware furnished which he never put on and the sliding door does not have the right hardware. Failed to furnish and install doors with closing equipment on all outside construction (Tr. 303); claimed he could not get the hardware and said he would put in something temporary, but never did fix them. Attempted to and did insist on charging extra for installing a hoist which was included in the contract, the identical same hoist was ordered before Mr. Gothberg signed the contract, the specifications were shown to him (Tr. 304). Failed to finish the building at the specified time, to-wit: December 1, 1950 (Tr. 305); it was around March when we were able to open (Tr. 306); had to install the washmobile ourselves and assemble it, Gothberg was supposed to assemble it and we paid $175.00 extra for the plumbing part of it; that the railing could have been put in on the stairway in due time (Tr. 306); water stands in the furnace room until it is swept out, water stands in the shop here and there, where the men are working, and practically everywhere on the floor except over the drain; you have to keep sweeping it all the time (Tr. 371-373);

Mr. Carr further testified that the front foundation wall was only down in the earth about 1½ feet (Tr. 403); that Mr. Gothberg did not furnish the door for the garage as originally ordered (Tr. 412); that Mr. Gothberg billed Mr. Carr for relocating the pumps the second time therefore making a double charge for the extra work (Tr. 431); he had to pay $80.96 for eleven (11) pieces of asbestos board that Mr. Gothberg should have put in the firewall, but was put in and paid by Mr. Carr (Tr. 437);

Then Mr. Charles E. Wyke was called as a witness (Tr. 451), and he testified that he worked for Mr. Gothberg on the job approximately three (3) months, the weather was getting very cold (Tr. 452); he testified that he worked alongside the men and several times they walked off the job in disgust because they did not want to do a bad job—sometimes they would not show up for two or three days because they did not want to lay blocks when it was so cold, as soon as they would put their trowels in the mortar, and touch it to the blocks, as a general rule the mortar froze immediately (Tr. 457); he testified that he would say four out of five times the mortar will disintegrate if it becomes frozen and it turns to powder and gets powdery and blocks can be readily jarred loose (Tr. 459); he testified that he took his knife and scraped through the paint on the heads of the bolts and rivets to see if there was any red lead on them and the heads were black and he could find no red lead on them at all (Tr. 461); the concrete around the windows looks like it had been frozen, the concrete floors

are flaking off and peeling around the front. He testified that he figured all the extra work that was done by Mr. Gothberg, including concrete walls, show room and office and whatever was done there, including the partition, including the balcony, and arrived at an estimate that the extra work done by Mr. Gothberg could be easily done for $2,750.00, and that he was giving him around $250.00 or $300.00, the best at that (Tr. 463, 464); he further testified that the mortar froze immediately as soon as it got on the blocks and was in a semi-state of being frozen before the block was laid and was frozen enough that it would not bind the blocks. (Tr. 475.)

Then Victor C. Rivers was called and testified he was a registered and professional engineer, had been practicing twenty-one (21) years, all of that time in Alaska; that he inspected the building, that very little cleaning up work had been done and that there was a considerable amount of debris at the South end of the building; that the plans and specifications provided for the contractor to clean it up; the work was not complete; the specifications called for a grade of the floors of 3/16 inch to the foot toward the drain; there were bad depressions in the floor some as much as ½ to ¾ of an inch which were full of water and which instead of draining to the floor drain at particular points, the grade was evidently in the opposite direction, the floor in the boiler room is low at the stairs and grades away from the drain about 1½", it is lower than where it should drain; there is about 1½ inches of grade differential in the wrong direc-

tion, it would never drain if left alone, the water would remain there until taken away or until evaporated. Along the front wall of the show room there is evidence of faulty concrete which has been painted over, but is scaling off in a number of places; it could have been caused by the grade of concrete used or the freezing (Tr. 504, 505); there are trowel marks and uneven places over the greater portion of that floor and very roughly finished job and is not finished in accordance with proper grade or proper quality of workmanship; the floor should be refinished, there are two or three ways it could be done, the top two or three inches of the floor could be removed and refinished with concrete and have it drain toward the drains that would have to be done with machinery such as a compressor and jackhammer or regular crushing machinery, and it is very expensive work; the floor in the show room shows trowel marks, rough finish and it is now painted and has a tendency to make it look smoother, but there are imperfections especially along the front windows. He went over the structural steel, scraping it with his pocket knife and found it to have the manufacturer's priming on the steel and what appeared to be on microscopic examination, one coat of aluminum paint and no evidence shown with the pocket glass of any other layers of aluminum paint. He inspected some of the bolts, rivets and welds, and checked five connections of this nature and scratched them and found no evidence of red lead or any other rust resistant primer on the connections. There appeared to be one coat of alumi-

num paint (Tr. 507); he testified that he examined the mortar used in the masonry and it had the appearance of having been frozen; that the mortar was what is known as lime mortar and the specifications called for a one to three, cement-sand mortar, and evidently a larger percentage of lime was used (Tr. 509);

The blocks over the windows in the South wall should be removed and replaced with proper standard of workmanship. The heat is lost there. The specifications provided for builders hardware of brass, and I found the hardware in the outside doors to be brass-plated steel hardware, including the door closers, which are already showing signs of rust and deterioration. It is installed loose, not a good fit and not up to acceptable standards. There was to be kick plates and push plates on the doors on both sides—there are kick plates only on one side of each door, and no push plates at all. The inside door hardware on three (3) different doors connecting the garage to the show room is not as specified. The hardware called for two (2) of those doors to be on over-head tracks and roll-away—there is no such hardware there. The locks and knobs and latches are very loose, they are bedroom-type hardware, not front entrance hardware, and they are not in accordance with the specifications, and not of acceptable standards (Tr. 510-512); the plate glass appears to be of uniform size but does not fit the openings and in two (2) places along one side there is a substantial crack, from nothing to ⅛ of an inch, with wooden shims to keep it from falling out. The metal sash installed has many hammer and tool

marks on it and they have used a small nail around the inside, just ordinary steel nails which have now rusted. It is very poor workmanship; does not fit the openings and not an accepted standard of material and some of the stops inside have not yet been installed and they are missing (Tr. 513); the industrial sash around the South and East walls of the building are not fitted, the openings vary in size, and the sash themselves are loose, and they have been corked with plastic corking which was very poorly put on, and is a very sloppy job below acceptable standards of workmanship (Tr. 516); the specifications call for hot and cold water pipes to have a coat of paint and then be insulated in their entirety. The cold water pipes were not painted and are not insulated and approximately one-half of the hot water pipes have been poorly covered with insulation. Neither of the pipes have been painted (Tr. 517); the floor could be fixed for about $1.00 a square foot—about $5,000.00 total (Tr. 519, 520); the boiler room could be fixed for approximately $125.00 to $150.00 (Tr. 524); it will cost to remove the old blocks in the walls and put in new blocks or replace the existing blocks, about $3.00 per square foot (Tr. 525); the mortar does not have the strength of a cement mortar. (Tr. 527.)

On Cross-Examination.

He further testified that on his first visit "there were puddles on the floor as deep as ¾ths of an inch, about as big as that second table in front of you, and a number of depressions at another location under

the hoist where there is a considerable depression—noticed that as well'' (Tr. 533-534). If he owned the garage, he would not accept the floor, from somebody building it, without they replaced the floor, to a standard that was acceptable. (Tr. 536.) To fix a part of the basement it would cost around $150.00 for excavation, approximately $50.00 for backfill and also extension of the walls of the basement (Tr. 540-542); he estimated the cost of building boiler room and stair rail at $2,186.00 (Tr. 547); the exhaust pipe connections were not considered adequate for the purposes. (Tr. 570.)

ARGUMENT AND AUTHORITIES.

We have set forth in this brief, sufficient evidence to impart to you the facts, or a part of the facts, upon which we based our motion for judgment against the plaintiff notwithstanding the verdict of the jury—in other words, to either sustain our motion to dismiss the plaintiff's cause of action or to instruct the jury to render a judgment for the defendant against the plaintiff on the plaintiff's complaint, and our contention then and now, was and is, the original complaint alleged a compliance with the terms of the contract which by the very wording did mean a literal compliance and then over our objection, the Court permitted the plaintiff to amend the pleading to plead a substantial compliance and by the plaintiff amending, to plead substantial compliance, the trial court overruled the defendant's motion to dismiss the plain-

tiff's complaint and amended complaint; and also overruled the defendant's motion to instruct the jury to return a verdict for the defendant on the plaintiff's complaint at the close of all the evidence. These motions were made at the close of plaintiff's evidence, and at the close of all of the evidence, then the Court further overruled the defendant's motion for judgment notwithstanding the verdict, after the jury had returned its verdict to the Court. All of this was based upon the fact that there was neither a literal compliance with the contract nor a substantial compliance with the contract. Therefore the plaintiff could not possibly contend performance with the contract that admittedly he did not perform, and the defendant not having done anything to prevent its being performed, by the truth, and in fact, all the way through the evidence shows the defendant, Burton E. Carr, was trying his best to get the plaintiff, Victor Gothberg, to comply with the contract.

It will also be noted by the record that the trial Court did not properly instruct the jury on the definition of substantial performance, and denied the defendant the right to submit to the jury, the definition of substantial performance from Black's Law Dictionary.

It will also be noted that the defendant moved the Court to require the plaintiff to elect whether he would proceed on the contract or whether he would proceed on the theory of quantum meruit, and this motion was also overruled. At the close of all of the

evidence, the defendant's offered Instruction No. 1, after omitting the captain, reads as follows, to-wit:

> "You are instructed that the Plaintiff has failed to make out a cause of action against the defendant, Burton E. Carr, in favor of the Plaintiff, on his First Cause of Action; and
>
> On his Second Cause of Action; and
>
> On his Third Cause of Action; and
>
> On his Fourth Cause of Action; and
>
> On his Fifth Cause of Action; and,
>
> You are instructed to find in favor of the Defendant, Burton E. Carr, and against the Plaintiff on said causes of action."

and we are briefing our cross-appeal on the theory, that, of all the evidence most favorable to the plaintiff, there was no evidence to sustain either of his contentions of literal performance, or substantial performance, and before he would be entitled to a judgment for any sum, it was his duty to prove either literal or substantial performance and by the Court's submitting the plaintiff's case to the jury over the objections of the defendant, and the Court's failure to render judgment notwithstanding the verdict was error, and that said motion should have been sustained. On this question, we submit the following:

CASES AND ARGUMENT.

In examining cases pertaining to our contention that the appellee-appellant, Mr. Carr, as a matter of law should have had a directed verdict in his favor in this case, because there is not sufficient evidence that there had been either strict performance or substantial compliance of the contract, on which the appellant-appellee, Mr. Gothberg sues, we find first in the case of *Anderson et al v. Todd,* 77 N.W. 599, Supreme Court of N. Dakota, 1898, where the trial Court determined that there has been substantial compliance with the contract. Upon examining the facts, the Supreme Court of North Dakota reversed the decision of the trial Court. The defendant was desirous of erecting a two-story building on a lot owned by him. The price for erecting said building was to be $6,000.00, with payments made every 14 days. The evidence showed that there was no foundation under the front portion of the building as the contract required. The plaintiff alleged that he had performed the contract. The defendant answered this allegation stating that the work was done in an unskillful and careless manner and that the defendant had used defective and improper material. After discussing the doctrine of recovery under the theory of substantial performance in contracts, the Court went on to say on page 600:

> "But the doctrine does not go to the extent of compelling a person to pay the contract price for a building differing in important particulars from that for which he has contracted. The defendant

had a right to use his own judgment as to the kind of material to be used in this structure, and his own taste to fix the style of its architecture. All the details were set out fully in the written specifications and contract. This contract governs their rights. Upon its performance the defendant had agreed to pay the contract price, and by a performance of its obligations, as a condition precedent, the plaintiffs are enabled to compel payment of the contract price, and in that way only. The language of the court in Smith v. Gugerty, 4 Bar. 614, which was an action on a building contract, further illustrates what we have said: '* * * Parties should undoubtedly be exact in the fulfillment of their agreements, even to the smallest particulars; and, if they willfully or carelessly depart from any one of them, they should incur the penalty however severe it may be.' * * * In this case the facts do not bring the Plaintiffs under the protection afforded to those who have not fully, but have substantially performed their contract. The plans and specifications were in writing, and were for Plaintiffs' guidance. It is plain they did not follow them in the particulars already noted. These deviations and omissions were, in our judgment, neither slight, unintentional, innocent, nor easily remedied."

Undoubtedly from examining the evidence in the *Anderson* case, and the evidence in the case at bar, we see that the plaintiff has both willfully and carelessly failed to perform his duty in erecting this building. Through the testimony of Mr. Carr, appellee-appellant, and the testimony of Mr. Gothberg, appellant-

appellee, and the testimony of Mr. Rivers, engineer, witness for Mr. Carr, evidence has been brought out of a flood of departures from the original terms of the contract and of unskillful work done on the building.

In the case of *Rockland Poultry Co. v. Anderson,* 91 A. (2d) 478, Supreme Judicial Court of Maine, 1952, concerning a contract for the construction of a building to be used by a poultry farmer for the storage of metal cages containing live chickens. Here the plaintiff sued the defendant contractor, because the contractor had not constructed the building satisfactorily. He alleged that the foundation was not sufficient; that it was weak and faulty and had sagged and settled; that the floor had cracked and the walls settled. On page 480, the Court said:

> "A careful examination of the record convinces the Court that this claim of the plaintiff is correct. The jury verdict for the defendant is plainly wrong. The damages may not be large, as the plaintiff states in its brief, but the plaintiff is entitled to something for improper construction of the floor under the terms of the contract, which is proved by the admissions of the defendant, to the effect that the floor is not the good and substantial one he promised. There is no conflicting evidence on that point, for the defendant admits liability in an amount sufficient to make the floor 'good, strong, and substantial' as the contract required. The contract provided for a good building with 'ample and sufficient foundations', and the evidence does not show that to build such a floor was impossible. The defendant's expert witness stated that to build in that

> building a good floor 'you would have to excavate four or five feet'. It might be difficult but it was not impossible. It might cost the contractor more than he expected, but he was bound by his contract.
>
> Where a construction contract provides that a certain thing be done in a certain manner, or to obtain a certain result, it must be done by the contracting party if it is not impossible, and if it is not prevented by act of God or of the other party. There must be 'substantial performance.' "

In the case of *White et al. v. Mitchell et al.,* 213 Pac. 10, Supreme Court of Washington, 1923, where the plaintiff's two sisters contracted with the defendant for the building of a house. The price of building was to be somewhat less than $4,000.00. Payment was to be made as the work progressed. The testimony showed conclusively that the material used in the construction of the house was such as the contract provided, but the evidence also showed that when the contractor-defendant turned the house over to the plaintiff, there were at least four defects, as follows:

> "First, there was some poor work which resulted in some of the windows and doors not being properly constructed; the septic tank not being in accordance with the agreement, and other minor defects, all of which for a reasonably small sum could be remedied. Second, the southwest corner of the house was some three or four inches lower than other portions of the house. Third, the lower floor of the house was generally uneven and materially out of level. * * * Fourth, the hardwood and

interior finish had become soft, raised, uneven, and colored to a material extent."

The Court then said on page 12, laying down the rules of law concerning compliance with the terms of a contract in relation to this case:

"Undoubtedly, by their contract, the respondents impliedly, if not expressly, agreed to construct the house in a reasonably good and workmanlike manner. The mere fact that the ground was soft would not excuse them from the performance of their contract in a proper manner, unless it was of such character it would be impossible to construct a foundation upon it. For all that appears, a wider footing for the concrete basement would have prevented the foundation from sinking. The general rule is that a builder must substantially perform his contract according to its terms, and, in the absence of a contract governing the matter, he will be excused only by acts of God, impossibility of performance, or acts of the other party to the contract, preventing performance. If he wishes to protect himself against the hazards of the soil, the weather, labor, or other uncertain contingencies, he must do so by his contract."

In the case of *Superintendent and Trustees of Public Schools v. Bennett,* 27 N.J. Law, 513, 72 Am. Dec. 373, the Court said:

"* * * If a party, for sufficient consideration, agrees to erect and complete a building upon a particular spot, and find all the materials and do all the labor, he must erect and complete it, because he has agreed to do so. No matter what

the expense, he must provide such substruction as will sustain the building upon that spot until it is complete and delivered to the owner."

"Under the doctrine of these cases, and others like them, which might be cited, it was the duty of the respondent to construct the house in accordance with the plans and specifications, and they cannot be excused therefrom because of defects in the soil or unfavorable weather conditions."

On Page 13, the Court further said:

"Where the builder has substantially complied with his contract, the measure of damage to the owner would be what it would cost to complete the structure as contemplated by the contract. There is a substantial performance of a contract to construct a building where the variations from the specifications or contract are inadvertent and unimportant and may be remedied at relatively small expense and without material change of the building; but where it is necessary, in order to make the building comply with the contract, that the structure, in whole or in material part, must be changed, or there will be damage to parts of the building, or the expense of such repair will be great, *then it cannot be said that there has been a substantial performance of the contract.*"

In the case of *Dorrance et al. v. Barber & Co. Inc.*, 262 F. 489, Circuit Court of Appeals, Second Circuit, 1919, the following definition of substantial performance was laid down:

"Substantial performance, as that phrase is correctly used, means not doing the exact thing promised, but doing something else that is just

> as good, or good enough for both obligor and obligee; and courts and juries say what is good enough or just as good."

It is noted that if you apply this definition to the case at hand, the appellant-appellee, Mr. Gothberg, did not perform a job just as good as was contracted for, or good enough for both the obligor and the obligee.

In the case of *Turner v. Henning,* 262 F. 637, Court of Appeals of District Columbia, 1920, where the plaintiff-contractor obtained a mechanic's lien against the defendant's dwelling house, which plaintiff had constructed. The testimony showed that the specifications called for a concrete floor in the cellar consisting of a 1″ top and a 3″ base making 4″ in all. But the floor as laid did not have a 1″ top, but measured from 1½″ to 2½″ in total thickness. Using a little pressure with a pick, the surface of the floor could be punctured. Other evidence of defects in construction was also introduced. The Court said the plaintiff was not entitled to recover under the doctrine of substantial performance and the Court laid down the doctrine as follows, on page 638:

> "That doctrine—'is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent, or unimportant omissions or defects. It is incumbent on him who invokes its protection to present a case in which there has been no willful omis-

sion or departure from the terms of his contract.' ''

Gillespie, etc. v. Wilson, 123 Pa. 19, 16 Atl. 36.

This case resembles our own case here to a great extent. Although it is our opinion that the appellee-appellant, Mr. Carr, in our case introduced much more evidence of defects in performance of the contract, in several instances a total failure of compliance and a stronger set of facts than were set out in the case cited just above.

In the case of *Spence v. Ham,* 57 N.E. 412, Court of Appeals of New York, 1900, this case was tried before a referee in the lower Court. The referee found that there were slight omissions and deviations in the performance of the contract, by the plaintiff-contractor, but such omissions and deviations were not willful or intentional; he stated that such omissions and deviations did not prevent substantial performance of the contract. The contractor failed to have the girders of certain lengths as specified by the contract; failed to have trimmers and headers double instead of single; failed to put drawers and shelves in the closets; failed to put wooden partitions on a brick wall in the basement; and there were other small deviations. The Court said in order to recover *at all,* the contractor must either show full performance or substantial performance. Upon showing full performance he can recover the contract price; but, upon showing substantial performance, he can only

recover for the work that was done. The Court further said that where the omissions and deviations are slight and unintentional, recovery will be allowed, because otherwise a hardship might be done. It was further stated that substantial performance depends somewhat upon the good faith of the contractor. If he has intended or tried to comply with the contract and has succeeded except as to some slight omissions and deviations, he will be allowed to recover the contract price, less the amount necessary to complete the contract.

In the case of *Herdal v. Sheehy,* 159 P. 422, Supreme Court of California, 1916, here the facts were: The defendant contracted with the plaintiff's assignors to build a house on defendant's property, for $3,565.00, payable in four installments. All of the contract price was paid except $660.00. A lien for this amount was filed by the plaintiff's assignors. In performing the contract, the contractor placed the building partially upon public property. Here the Court held that there was not substantial compliance with the contract by the contractor erecting the house, and the contractor's assignees could not, therefore, collect the contract for the construction of the building.

In the case of *Nance v. Peterson Bldg. Co.,* 131 S.W. Rep. 484, 1910, a contractor contracted to build a house for $2,800.00—$100.00 to be paid in installments. The house was to be a duplicate of a certain house built in another town in Kentucky.

The evidence showed that the house was not completed by the date named in the contract. The foundation of the house was different than the one called for in the contract. The doors and windows were different than the ones specified in the contract. The cement construction in the cellar was defective and faulty. The house did not have suitable sewerage or drainage pipes to carry the water from the bathroom and sinks. Some of the concrete work in the cellar became cracked from faulty workmanship and there was other evidence of defects in the construction of the house.

The Court instructed the jury that if the house was built substantially as provided for in the contract there was sufficient performance. The case held that the facts stated did not authorize such an instruction. It is shown by the evidence there was not substantial performance of the contract. The Court stated further at page 485:

> "As defining the phrase 'substantial compliance' The Court told the jury: 'Substantial compliance and performance, as used in instructions 1 and 2, permit only such omissions or deviations from the contract as are inadvertent or unintentional, are not due to bad faith, do not impair the structure as a whole, are remedial without doing material damage to other parts of the building in tearing down and reconstructing, and may without injustice be compensated for by deduction from the contract price.'
>
> To recover the purchase price from her, it must have tendered the structure as agreed. Trivial

departures in executing the work would not have excused appellant from accepting. And where the evidence is such as to leave it in doubt, or to be determined from conflicting evidence whether the performance of the contract was substantial, and whether any departure was material or merely trivial and inconsequential, is for the jury, who determine the fact by the standard of their own common sense and experience. It must always be born in mind that neither the jury nor the court are at liberty to make a contract for the parties, or to alter the one already made. Therefore, although the jury or the court may think that the house as built is equivalent in value or utility to the one contracted for, they are not at liberty to suffer the substitution on that score."

In the case of *Golwitzer et al. v. Hummel,* 206 N.W. Rep. 254, the facts were that a contract was entered into whereby a house was to be built for the appellant.

The contractor was to furnish all the materials and labor except the furnace and installation of the same and all the plumbing fixtures. The house was to be given two coats of paint outside and to be shingled with red fireproof shingles on the roof. The dining room and living room were to have 3/8" clear flooring. All other rooms were to have good grade yellow pine flooring. The interior was to be finished in clear yellow pine and the bathroom was to be white enamelled. The contractor was to receive $4,000.00 when the house was completed together with an old house and barn.

The payments were to be made as follows: $1,000.00 when the basement was completed and the lumber on the ground sufficient to complete the rough construction; $1,000.00 when the rough construction was completed; $1,000.00 when the plaster was finished and $1,000.00 when the building was finished. The basement was to be cemented with drain. All the work and materials were to be first class and the building was to be built according to plans attached to and made a part of the contract.

The appellant objected to paying the third payment. Their objections grew out of claims of defective work. The evidence pertaining to construction of building showed that the cement mixture for the foundation and basement was not a good mixture. The basement was to slope to a given point for drainage purposes, but a large part of the floor did not drain to this point. The front porch roof was defective. The porch pillars were too small and were not plumbed. The roof of the house leaked and sagged. In some instances there was no paper under the shingles as the contract called for and the laying of the shingles was irregular at places. The windows in the attic were immovable. The furnace was not located in the place indicated in the plans.

The contractor alleged that there was substantial performance of the contract.

The Court said at page 256, pertaining to these facts, as follows:

"* * * but we do not deem this case one for the application of that doctrine. The variance from the original contract is such that it rather tends to show a willful purpose to make as cheap a job as possible out of this. More than this, in the written contract there was a provision that all work and material were to be first class. Suffice to say that the appellees did not live up to this provision. Taking it all in all, we reach the conclusion that the appellees were not entitled to recover herein, and the District Court should have so held."

In the case of *Cohen et al. v. Eggers et ux., Same v. Breden et ux.,* 220 N.Y. Supp., 109—1927, there the trial Court found that the plaintiff contractor did not perform the mixing and laying of cement for the cellars of two houses in accordance with specifications resulting in disintegration of the finished work. There were other defects also found by the trial Court such as roof of the houses leaked badly, there was not any sheet rock installed in the garages as was called for by the specifications, and the failure to put concrete pillars under the porch as was specified under the contract. The Court said pertaining to these facts, even a slight deviation from the specifications presents a close question as to whether the plaintiff had performed under his contract to which he is entitled and the Court further said that the deviation stated in this case amounted to a substantial deviation from the terms of the contract therefore

there could be no recovering by the plaintiff against the defendant under this contract.

In the case of *Brainard v. Ten Eyck,* 168 N.Y. Sup. 116—1917, there the plaintiff and contractor brought an action against the defendant to recover $1,276.95. The defendant alleged failure to perform the contract on the part of the plaintiff, and claimed damages for $1,000.00. The contract price was $5,329.00, $4,180.90 had already been paid by the defendant to the plaintiff for work performed. The jury rendered a verdict for the plaintiff in the amount of $1,000.00. The defendant moved to set aside the verdict on the grounds there were omissions and defects in the structure of the building and therefore not substantial performance. The defects found by the Court were as follows: Failure to construct trimmer beams, defective construction of back stairway, cutting away a bearing beam for the insertion of pipes, failure to connect the gutters on the house with the street sewers, lack of double beams over the partitions. The Court said, there does not seem to be substantial performance of the contract as would require the defendant to pay the contract price, less small deductions, for unsubstantial and minor defects. Unless the contract was substantially complied with the plaintiff cannot recover under the law.

In the case of *North American Wall Paper Co. v. Jackson Construction Co. Inc., et al.,* (No. 7129) 153 N.Y. Sup. 204—1915, in an action to foreclose a

mechanic's lien, the contract provided that the plaintiff's assignors should do all the work for the gross sum of $3,200.00. The sum of $2,150.00 was paid on account. This lien was for the balance left unpaid. The principal question raised by the defendant was, that there was no substantial performance of the contract. The principal question litigated on the trial was regarding the performance of plaintiff's assignors with respect to varnishing the floors, enameling the dadoes and tubs in the bathrooms, and painting the bathrooms, kitchens and bedrooms. Plaintiff claimed full performance of the contract. The trial Court found that the plaintiff had substantially performed the contract.

This Court of Appeals said, "there is limited application of the rule of substantial performance, and a party who knowingly and willfully fails to perform his contract in any respects or omits to perform a substantial part of it, cannot be permitted under this rule to recover the value of the work done."

In the case of *Knutson v. Lasher et al.,* 18 N.W. Rep. 2d 688—1945, states as follows, on the doctrine of substantial performance, on page 695:

> "The doctrine of substantial performance, under which Plaintiff claims he is entitled to recover, does not confer on a contractor any right to deviate from the contract or to substitute what he may think is just as good as what the contract calls for. *Where the deviation is willful, the contractor is not entitled to recover at all.* It is only

where the deviations and defects are unintentional and not so extensive as to prevent the owner from getting substantially what he bargained for that the contractor is entitled to recover under the doctrine mentioned. *After all, the owner has the right to specify what he wants and to obligate himself by contract to pay only for what he specifies.* (Emphasis ours.)

SUMMARY.

Now in summing up—after reading a lengthy transcript and reading a great number of cases on the doctrine of substantial performance, I think there is ample evidence of willful, careless and negligent departure from the terms of the contract, to prevent the plaintiff from recovering anything at all. It could not be doubted also that the great weight of the evidence shows that the appellant-appellee, Gothberg, failed to install a substantial amount of the materials required and failed to perform much of the labor contracted for under the terms of the contract and specifications, and much of the work done by him was so defective, in nature, that it is of no value to Mr. Carr as shown by the evidence that to fix the floors alone, will cost $5,000.00, and the walls must be relaid and a great portion of the work done over; that the amount of $34,672.57 paid to the plaintiff by the defendant, Burton E. Carr, plus all of the obligations paid for the plaintiff by Mr. Carr, amounting to thousands of dollars have amply paid the plain-

tiff and overpaid him $8,131.63, as found by the verdict of the jury which verdict was returned with the other verdict which was for the plaintiff, on the theory set forth in the trial Court's erroneous instructions on the theory that substantial compliance had been proven.

We most respectfully contend that on our cross-appeal that this Court should reverse the trial Court's holding of substantial compliance on the part of the plaintiff and uphold our motion to dismiss the plaintiff's complaint, all as shown by the record herein and should uphold the verdict awarding Burton E. Carr, $8,131.63, as awarded for breaching and non-performance of the contract.

We will now endeavor to answer appellant Gothberg's brief:

ANSWER TO BRIEF OF APPELLANT VICTOR GOTHBERG.

We feel it would be unfair to the Court to make another statement of fact here since we have done so in the brief above and will only resort, if at all, to statements of fact where it becomes necessary to answer the appellant's argument.

ANSWER TO ARGUMENT NO. I.

In this assignment, appellant Gothberg contends that the Honorable Anthony J. Dimond, late district judge, of our Third District, erred in not instruct-

ing the jury to return a verdict on his first, second and fifth causes of action. We can see no merit whatsoever in this contention, there was a flood of evidence in contradiction of the plaintiff's right of recovery on these three causes of action therefore we feel that our argument in support of Burton E. Carr's motion for an instructed verdict against the plaintiff, Victor Gothberg, as set out above, completely answers this part of the brief and will not burden the Court with further argument or further citations. The whole case was tried and a question of fact arose on every cause of action of the plaintiff. It will be noticed in the evidence that there was considerable controversy over the improper cutting off of the foundation and rebuilding of a portion thereof, covered by the first cause of action, and there is positive and undisputed evidence that thousands of dollars were paid to the plaintiff by the defendant Burton E. Carr after the crude, unfinished job had been done by the plaintiff which is set forth in the plaintiff's cause of action No. I. The same situation exists as to the cause of action No. II, which was controverted in every particular and therefore became a question of fact for the jury and as to the fifth cause of action, the testimony shows practically a complete failure of performance on the part of the plaintiff contractor, Gothberg, on the matters referred to in said cause of action. However, the undisputed evidence shows that the contractor was paid for the work he did, the sum of $34,672.57, which far more than compensated him for any work performed or materials furnished

by him and in the opinion of the defendant, Burton E. Carr, overpaid Mr. Gothberg many thousands of dollars for the improper, sloppy, half-performed contract and even the plaintiff, Victor Gothberg, admitted in his testimony that he did not finish the building according to the plans, specifications; and contract; admitted that the wire mesh was not installed in the ramp, that the cylinder type block partition (fire wall) was never installed, that the compressor was never installed, that he attempted to collect extra for installing the hoist, admitted that he received a demand to finish the contract, a copy of which was set forth and attached to the cross-complaint and was set out above. In this written demand and request for the contractor to finish the job, there are 37 direct requests for the contractor to do to comply with the terms of his contract, and the contractor ignored the requests and demands, and filed suit instead, alleging substantial compliance with the contract, and the statement of fact above set forth clarifies in our opinion the issues joined along that line. Just two of the contentions—that is the floors and the walls of the garage, will require the outlay of thousands of dollars to make them usable and actually safe and a workmanlike job as contracted for, and those two alone, the east wall and the south wall will cost more than $2,000.00 to fix and the front wall which is concrete and glass, the testimony shows that the contractor left a tamping stick (wood) in the forms when the wall was poured and that there is a large crack in the wall at this place, and the costs

of the fixing of the concrete floor would be $5,000.00. Therefore, two items alone amount to more than the jury allowed the defendant as a reduction against the judgment found for the plaintiff and in truth and in fact the jury was far too liberal with the plaintiff. However, the Hon. Anthony J. Dimond, adopted the findings of the jury—one of which was unquestionably that the plaintiff, Gothberg, never complied with the terms of the contract not even substantially because he allowed the defendant a judgment over and against the plaintiff to be offset against his judgment to the extent of $8,131.63, and did allow the plaintiff $6,119.19, and the said plaintiff having previously received $34,672.57; makes a total that he would receive all together of $40,791.76, for butchering up and failing to comply with a contract wherein he agreed to do, in a first-class workmanlike manner, for the sum of $38,450.00. Even if he had performed all of the work in a workmanlike manner, in accordance with the terms of the contract, and had performed the actual extras that Mr. Carr admitted were extras, the $40,791.76 plus all of the plaintiff's bills, paid by Mr. Carr, would have paid him adequately for a finished, good, respectable job and the evidence all shows that he failed to perform such services or finish the job therefore in our humble opinion, there is no merit in Argument No. I.

ANSWER TO ARGUMENT NOS. II AND III.

The same applies to Argument No. II as applies to Argument No. I. The first contract was never fully performed according to the terms thereof as shown by the testimony set out in our brief above. Foundation was defective, the boiler room floor was defective, and many other noted defects are mentioned in the testimony. This point No. II challenges the Court's ruling denying appellant's motion to dismiss the appellee's cross-complaint. The testimony was strong in support of appellee Burton E. Carr's cross-complaint and the Court and jury each believed in the merit thereof and the jury rendered a judgment on the cross-complaint for more than $8,000.00, and the late Hon. Anthony J. Dimond, district judge, sustained it and rendered judgment thereon. Thus we contend the argument unreasonable.

As to Argument No. III, it is quite apparent that the jury felt justified in rendering judgment for the plaintiff and allowed a definite sum of money; then allowed the defendant a judgment for a definite sum of money to be deducted from the amount rendered in favor of the plaintiff, and the Honorable Anthony J. Dimond made the deduction and entered judgment in compliance therewith.

All of the statements on paragraphs VIII, IX, and XI, were arguments that were made to the jury or similar to the arguments made to the jury, and the jury having full and complete information before it determined the questions as shown by the record.

We wish to call your attention to this man Anderson, whom the plaintiff, Gothberg, brought to Mr. Carr to get Mr. Carr to employ him as an architect on the job and Mr. Carr testified that Gothberg recommended him, that Gothberg brought him to Mr. Carr's home, that he paid Anderson & Smith, $2,700.00; that Anderson agreed to be on the job every day until the job was completed and if he could not be there, he would have a man there to represent him. (Tr. 324.)

All the way through the evidence, it is quite apparent that Mr. Anderson was looking out for the interest of Mr. Gothberg and not for Mr. Carr. He even wrote a letter directing work to be done when he knew that the particular work had already been performed and there were other tricks all the way through indicating a conspiracy between Mr. Gothberg and Mr. Anderson, therefore, I trust that the Court will look upon Mr. Anderson's testimony with caution as the Trial Court and jury must have done.

We, in our humble opinion, believe that the proof on the cross-complaint of Burton E. Carr was more than adequate and that the verdict of the jury was lesser than the amount clearly proven by the weight of the evidence, however, we were required by law to accept the verdict as rendered.

The case of *Lease v. Corvallis Sand & Gravel Co.*, 185 Fed. 2d 570, is cited by appellant. We have tried to analyze this case, and we cannot find anything about the case that would support the contention of the Ap-

pellant Gothberg. This was a suit for furnishing some additional concrete and the trial judge found in favor of the plaintiff and the Ninth Circuit Court of Appeals, acting through the Hon. Justice Pope, wrote the opinion which was concurred in by Justices Matthews & Healy.

While the law stated therein seems to be, in our opinion, correct, in every way, it does not apply to the case at bar at all. The cross-complaint in this case was supported by evidence of various kinds and was supported also by expert testimony of an engineer whose integrity and ability have never been questioned so far as we know in any way, and a man of outstanding reputation in Alaska, Victor C. Rivers, as well as the fact that the jury, by agreement of counsel, were allowed to view the premises, and did view and see the premises in their entirety, under the custody of the bailiff and every scintilla of the cross-complaint was sustained by competent evidence.

Therefore, it would have been error for the judge to dismiss the cross-complaint and his refusal to sustain the motion to dismiss was in our opinion a correct ruling.

ANSWER TO ARGUMENT NO. IV.

The motion of the appellant for judgment notwithstanding the verdicts or in the alternative, for a new trial, for the reason that the verdicts are inconsistent and that the verdict No. 1 is contrary to the evidence,

and that verdict No. 2 is inconsistent with verdict No. 1, we feel that the rule set forth in the appellant's brief is more favorable to the sustaining of the judgment than it is against the judgment especially wherein it is stated "the verdict must be certain enough to enable the Court to reduce it to form, if informal and consistent in its several awards and findings * * * the verdict should follow and conform to the instructions, even if erroneous and disregard for them, is grounds for a new trial or reversal *unless it can be said that no prejudice resulted.*"

At the close of the instruction (Tr. 760), the trial judge made this statement:

> "If you find for the plaintiff and against the defendant you will insert in the verdict which has been prepared for that contingency and which is marked 'Verdict No. 1' *the sum which you find that the Plaintiff is entitled to recover of and from the defendant* and your foreman will thereupon date and sign the verdict and you will return the same into Court as your verdict."
>
> "Similarly, if you find that the plaintiff is not entitled to recover any sum whatever against the defendant, and that the defendant is entitled to recover from the plaintiff, *you will (740) insert in the form of verdict which has been prepared for that contingency and which is marked 'Verdict No. 2', the amount which you find the defendant is entitled to recover from the plaintiff* and your foreman will thereupon date and sign that verdict and you will return the same into Court as your verdict." (Emphasis ours.)

You will note the two forms of verdict in the file, (Tr. 70 and 71), while probably the jury should have deducted the $8,131.63 from the $14,250.82, as shown by the two verdicts, yet it is very clear that what the jury did was, they found that the plaintiff had coming on the contract and for extra work, $14,250.82 and that the Defendant had an offset against that amount to the extent of $8,131.63, these two amounts were unquestionably unanimously agreed upon by the jury, then it became only a mathematical question, of deducting the lesser from the greater and rendering a judgment for the plaintiff for the amount of the difference. The trial judge convinced himself at the time the jury returned the verdict that that was their definite intent. I have always thought that if a verdict was definite enough that the Court could determine what was meant by the jury, that the verdict was sufficient and that the trial judge should render the judgment based thereon. This is very true where the general verdict and the special findings conflict and Rule 49 of Federal Rules of Civil Procedure provides that the jury may return a special verdict in the form of special written findings upon each issue of fact. In that event, the Court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidences * * * it further provides that if in so doing, the Court omits any issue of fact raised by the pleadings or by the evidence, each party waives right of trial by jury of the

issue so omitted unless before the jury retires, he demands its submission to the jury.

Paragraph (b) of Rule 49, provides "the Court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact, the decision of which is necessary to a verdict * * * when the general verdict and answers are harmonious, the Court shall direct the entry of the appropriate judgment upon the verdict and the answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the Court may direct the entry of judgment in accordance with the answers notwithstanding the general verdict * * * Naturally the Supreme Court in making these rules, realized that the trial judges in these Courts were men far above normal intelligence and men trained in the law who were trying to do justice between the parties, therefore, these rules give a broad discretion to the trial judge in rendering the judgment on the verdict, so long as he is able to understand and determine the intent of the jury.

These two verdicts in our opinion are not against the instructions given by the Court. The instructions set out above clearly show how the jury could arrive at a conclusion that the Court wanted them to find the amount due the plaintiff for extra work and the balance due on the contract and also wanted them to determine the extent of the defendant's off-set by reason of the plaintiff's failure to comply with the

terms of the contract and to finish the job and knowing all of the facts in the case as we naturally do from having been present in all of the proceedings, we can certainly see no prejudicial action on the part of the Court. The jury clearly showed by their verdict No. 1 that they believed there was a balance due on the contract and for extra work in the sum of $14,250.82 and also found that against that amount, the defendant on the cross-complaint was entitled to recover an off-set against said sum to the extent of $8,131.93. They even fixed the dates of the running of interest at the same time—to-wit: March 1, 1951 in both verdicts.

A careful reading of the evidence will surely disclose that the late Hon. Anthony J. Dimond thoroughly understood the two verdicts, did what the jury intended that he do in the matter and the plaintiff in preparing the judgment (Tr. 79) apparently understood thoroughly the intent of the jury as you will notice the wording of the judgment. Under Rule 61—Fed. Rules of Civ. Procedure, which reads as follows:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the Court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or de-

fect in the proceeding which does not affect the substantial rights of the parties."

We sincerely believe that the trial Court committed no error in accepting the two verdicts and carrying out the intent and purpose of the jury in rendering the two verdicts.

ANSWER TO ARGUMENT NO. V.

It will be noted that the appellant claims error of the Court admitting Exhibit "T" which was one of the plans for construction and it is our contention that that cannot be raised here because it is not part of the transcript and is not properly covered by the designation of record. (Tr. 771.) We feel that if the exhibits were printed, this question would eliminate itself automatically, however, we believe the introduction was proper because of several reasons, one of which was that Anderson the engineer, that was furnished by Mr. Gothberg, and hired by Mr. Carr while testifying as a witness for Mr. Gothberg, testified on direct examination in response to questions by Mr. Arnell as follows (Tr. 613):

"Q. Did you revise the first plan that was drawn, for the purpose of moving the building back and tearing out a portion of the old foundation already constructed?

A. I didn't revise the plan. I drew the plan which is now in evidence.

Q. Is that the only plan that was in existence at the time the first contract was signed on May 25th, 1950?

A. It was the only plan in that contract. We had started work (581) on the remainder of the building, but was not part of the original contract. * * *

Q. Did you prepare all of the specifications that are specified in this litigation, Mr. Anderson? All the specifications?

A. I did not prepare them all personally. I had hired personnel under me that did prepare all of them.

Q. Are you familiar with all of them, then?

A. Yes, sir.

Q. Directing your attention, Mr. Anderson, to page SW-1 again—the last sentence in the first paragraph, which reads: 'This work shall include a concrete apron by the gas pumps, but shall not include the wallboard or finish carpentry on any interior partitions, with the exception of the shower room and one restroom.' I believe the original plans called for a block wall across the middle of the building, did they not?

A. Yes, a block fire wall.

Q. How high was that wall to be?

A. As I remember, it is eight feet.

Q. Did the plans and specifications contemplate any partition or wall to be constructed above that height of eight feet?

A. No, in this contract, no.

Q. Do you know what type of wall actually was constructed?

A. Yes, I have been in the building since and there is a frame wall. I don't remember just exactly what it consists of." * * *

These questions were asked and these answers given (Tr. 613):

"Q. Did you design the marquee also, Mr. Anderson?

A. Yes, sir, I did.

Q. Are you familiar with the manner in which it was constructed, and the conditions that were incurred during construction?

A. Yes, sir.

Q. Was it necessary to install extra beams or more beams, I should say perhaps, than were available on the job?

A. Yes, there was a channel that ran across the back of the structural member of the marquee, which were 2 by 14 lumber, and that channel was run across the back to support the back of the 2 by 14's, so when snow got on the marquee it wouldn't drop down, and it was also necessary to put in a support on the front of the building down to that channel.

Q. Under your interpretation of the specifications, would the cost, and also the installation of the beam, be an additional charge for which Mr. Gothberg would be entitled to reimbursement?

A. The specification stated there was steel on the job. The amount of steel was not stated. At the time the contract was let, we did not have information as to how much steel was there. My interpretation of the specifications would say that the cost of the beam itself would be extra; however, the installation was required by the contractor." * * *

Then again (Tr. 638), cross-examination by Mr. Bell:

"Q. Now, Mr. Anderson, how long have you known Mr. Gothberg?

A. About four years.

Q. And you have handled several matters for Mr. Gothberg, have you?

A. I have been concerned with Mr. Gothberg on one Government contract, and on this contract. I have known him personally due to this association.

Q. When did you first meet Mr. or Mrs. Carr?

A. I am not sure whether it was late in the Fall of 1949 or in the Spring of 1950." * * *

(Tr. 640):

"Q. When did you draw those plans that's marked BCG No. 1?

A. I wouldn't remember the exact date.

Q. That is the foundation plan.

A. I don't remember the exact date. I believe there is a date on the plan.

Q. Would you look at this plan and tell the jury when you drew that, if you did draw it?

A. It is dated April 5, 1950. That would be the date of completion of the plan.

Q. April 5, 1950? Is that the first plan, now, that was drawn by you or your associate?

A. This was the first final plan. There were preliminary plans before this, but this is the first final plan.

Q. Where as those preliminary plans?

A. I imagine I have destroyed them. They were merely sketches (655) to give an idea of what we were going to do.

Q. Was that similar to the one you saw here this morning, and said you had never seen it before? Were the preliminary plans similar to that?

A. No, it would be very similar to the one you have there as BCG 1.

Q. Do you think that is a preliminary plan, or is that one of the final plans?

A. That was a final plan.

Q. And that was dated in April of 1950?

A. Yes, sir.

Q. Now, I am calling your attention to BCG 8. I will ask you to state to the jury the date that you drew that, if you did draw it?

A. It is dated August 21st, 1950.

Q. Now, that is evidently the date that that plan was first brought into existence as a finished plan, wasn't it?

A. That was the date that it was drawn up in the finished plan, made up into the final set, yes.

Q. Now, Mr. Anderson, would you look at this drawing here, in the middle, and tell us what that represents—from there across, and back down to there. Is that steel?

A. That is a 12 foot channel, weighing 20.7 tons per foot.

Q. And that is a steel channel—iron, is it?

A. Yes, sir (656).

Q. And when you drew this plan, you drew that in there, did you?

A. Yes, sir. I don't believe that I did the actual drawing on this; however, I am responsible for the drawing here.

Q. I will ask you what that instrument is to the right in the middle of the plan, and to the right side. What does that represent? It says beam, does it not?

A. That is the 14 inch wide flange—30 pound beam for the door.

Q. Steel beam?

A. Yes, sir.

Q. Then is this the marquee here—the drawing for the marquee?

A. It is a structural drawing for the marquee, and it also has some architectural details on it.

Q. Now, was the contract let to Mr. Gothberg based upon these plans, the whole set of plans, all the way through?

A. Yes, sir. Wait a minute—there were two contracts.

Q. I am speaking of the main contract—September 19th—for the building?

A. Yes, sir." * * *

(Tr. 655):

"Q. What is this instrument here?

A. This instrument is an angle iron support to hold the end of this channel from lifting up, due to weight at the end of this marquee. (658)

Q. Was the marquee built according to the specifications and plans, by Mr. Gothberg?

A. Yes, sir.

Q. Then those pieces of steel drawn in there, are they all in place?

A. Yes, sir." * * *

We call your attention to the cross-examination of Mr. Gothberg, (Tr. 153), as follows:

"Q. Mr. Gothberg, would you look at this map here—this plat—and see if that is your initials on there?

A. That is right.

Q. Did you put it there?

A. I did.

Q. And you then made the contract knowing exactly about this?

A. Oh, yes, I knew.

Q. And, Mr. Gothberg, what does this drawing right through here represent?

A. That is the walls.

Q. Is that a wall? (78)

A. That is right.

Court. The jury can't see what counsel is pointing at. If it is very important I would suggest you staple it to the board. Counsel can do as he pleases.

Mr. Bell. Yes, your Honor, I think we should do that.

Q. Mr. Gothberg, would you come down so the jury can see. Now, did one of those beams go through here?

A. No.

Q. Where did the beams go?

A. Here's the beam.

Q. Is that the beam?

A. Yes.

Q. That is the beam you charged him $500 for?

A. That is right.

Q. Where is the beam that you charged him the other?

A. It don't show on the plan. That's on top of this end here to carry the end of the joists.

Q. Mr. Gothberg, didn't your just misunderstand the drawing—isn't that a beam right there?

A. No, this is the wall.

Q. But you put the beam in all right?

A. Oh, yes.

Q. You learned from the plan that the beam had to be in there, did you?

A. No. (79)

Q. How did you learn that the beam had to be in there?

A. It was no plan drawn for that beam that holds the roof.

Q. Mr. Gothberg, all of this drawing was there at the First National Bank, and you and Mr. Cuddy and Mr. Burton E. Carr all went over these together, didn't you?

A. We did, yes, in Mr. Cuddy's office.

Q. That is the senior Mr. Cuddy?

A. Yes.

Q. And there hasn't been any change in the plans—these papers—in anyway, has there?

A. No.

Q. So you initialed this so that you could identify it? Where is your initials?

A. Right here." * * *

This seems to us to have been the same drawing Exhibit "T" that is mentioned throughout Argument V, and since the drawing, Exhibit "T", is not made a part of the record, there is no way of telling whether it is or is not, and the Court should give this assignment Argument No. V, no consideration.

We are not going to burden the Court further, by added reading of excerpts regarding this marquee as shown by the pencil drawing added and made a part of Exhibit "T", but it clearly shows that the pencil drawing in Exhibit "T", must have been used as authority for the other drawings because it was car-

ried forward in the other plans and the very fact that Mr. Anderson denied ever having this plan or denied having initialed it, and Mr. Carr testified that he was present at various times and Mr. Anderson did have it in his possession, there being a conflict in the testimony as to the initials on the plan and various other marks on the plans, then the same was properly admitted even though Mr. Gothberg might have said he did not remember having seen it. Nevertheless the instrument itself was a silent witness to the fact that it was the original plan from which later plans were made therefore we can see no error whatsoever in the late Honorable Anthony J. Dimond permitting it to be introduced in evidence and the citations are not in point at all.

The *Perkins v. Haskell* case as in 31 Fed. 2d 53, has no similarity and is not in point.

ANSWER TO ARGUMENT NO. VI.

It is contended that appellant's witnesses were permitted to testify contrary to the terms of the written contract between the parties—it is contended that Victor C. Rivers, the expert witness, as an engineer, testified that certain work actually performed by the appellant, based upon witnesses' examination of the contract was included in the terms of the contract, and was not properly chargeable as extras, this does not seem to need answer as it is self-answering.

If an engineer who is a specialist in construction engineering cannot testify to the terms of the contract before him, as to whether certain things were included or were not included therein, it would be a sad state of affairs and it will be noted that the plaintiff, Gothberg, had his engineer, Mr. Anderson, testify to the same things in reverse as testified to by Mr. Rivers, and the case cited by the appellant—*Castner Electrolytic Alkali Co. v. Davies,* 154 Fed. 938—is an action for damages for an explosion of a water heater brought under the New York Employer's Liability Act and this case does not support appellant's contention. We quote Syllabus 4 and 5 as follows:

"4. Evidence—Competency—Opinion of Experts. While it is competent for expert witnesses to enumerate the various causes which might have produced a given effect, and to state what bearing specific facts shown in evidence, would have upon the probability or improbability or one or more of such causes being operative at the time and place, it is not competent for them to state an opinion upon all the evidence, as to what cause was in fact operative; that being the final inference to be drawn by the jury."

"5. Appeal and Error—Review—Harmless Error. The erroneous admission of the opinions of witnesses as to the cause of an explosion held without prejudice, where the material facts were not in dispute, and the opinions were merely arguments therefrom. (Ed. Note—for

cases in point, see Cent. Dig. Vol. 3, Appeal and Error, *4153.)"

And the next case cited by appellant in his brief is *United States v. George A. Fuller Co., Inc.,* 300 Fed. 206, a District Court opinion effecting certain pleadings and is an action wherein the Government had sued the contractor on a cost plus basis contract for negligence and wrongful acts specifying a few of such acts and it is held that it would not be permitted to have general damages alleged, the difference between cost of construction paid by Government and reasonable cost of construction under existing circumstances, shown by the opinion of experts.

It will be remembered that both the plaintiff and the defendant in the case at bar used expert witnesses. Anderson was used by the plaintiff and Rivers by the defendant to testify as to the value of the extras also as to whether or not the work done complied with the terms of the specifications and contract, and it is our humble opinion that this was a proper method used by both parties.

In the case of *Campbell, J., v. The Domira* (DCED N.Y. 1931), 49 Fed. 2d 324, this is an admiralty case decided in the District Court of the Eastern District of New York by Judge Campbell and is based upon hypothetical questions asked of the expert Robinson, called on behalf of the Domira and were all in some considerable degree based upon the testimony of the officers and crew of the "Ireland" taken by deposition, and Syllabus 5 and 8 read as follows:

"5. Evidence—552.
Experts' answers to hypothetical questions, based on incompetent testimony, held inadmissible."

"8. Evidence—553(4).
Expert testimony, based on facts not in evidence and improper inferences from facts proven, is inadmissible."

We cannot see anything in the case that in any way assists the appellant here, and even the writer of the brief indicates that the testimony of the witness, Rivers, was not in violation of the parol evidence rule but claims that the witness, Rivers, was permitted to testify that certain parts of the work performed were covered by the contract and were not extras.

In *Hamilton v. United States,* 73 Fed. 2d 357, a case cited and relied upon by the appellant, if in point, is not in support of appellant's contention, we quote Syllabus 3 and 5 which we think are directly opposite to the contention of appellant:

"3. Evidence—470.
Expert opinions are allowed by way of exception to general rule that witness is to give facts observed but not his conclusions from them, only where there is real helpfulness or necessity to resort to opinions."

"5. Evidence—506.
Admissibility of question put to expert asking his opinion on exact ultimate issue before jury depends on nature of issue and circum-

stances of case, *large amount of judicial discretion being involved.*" (Emphasis ours.)

The questions asked engineer, Rivers, in this case was whether or not certain work was provided for in the plans and specifications (see brief of appellant, page 27), this was a direct question that any engineer could answer by looking at the contract and stating whether the stairway and stairwell to the boiler room was provided for in the contract or not and called for an interpretation of the plans, specifications, and contract which were within his specialty and while he was testifying as an expert we feel that he had a right to answer the question as the Honorable Anthony J. Dimond expressed when he stated "He is testifying as an expert on the plans and specifications and I think the question may be answered—objection is over-ruled." Especially in view of the fact that engineer Anderson testified for the plaintiff and was asked similar questions, answering them at all times, and to single out one particular question and answer would defeat justice and if error, at all, it would be harmless error, and we contend it was not error at all.

It should be borne in mind that both of these engineers were permitted to testify the meaning of certain signs and symbols shown by the plans and specifications.

Engineering being a definite type of profession, any engineer who is an expert should be permitted to testify to the general interpretation of these constantly

used characters in the drawings of plans and specifications and the meaning thereof and that nothing more was done in this case by either engineer and if it was objectionable on the part of Mr. Rivers' testimony, then it was surely balanced off and became a harmless error when engineer Anderson was permitted to give his opinion and explain details of the drawings, plans, and specifications and we feel there is no merit to this argument whatsoever.

ANSWER TO ARGUMENT NO. VII.

This argument stated that the appellant attempted to prove a usage in the area in trade—to-wit: That an owner moving in and occupying a building being finished by the contractor, accepted the building and waives any non-compliance with the building contract. This matter was injected into the evidence by asking Mr. Gothberg if he was familiar with the custom of common usage that was recognized in the contract trade where an owner occupies a building that is in the process of construction or being finished and the witness answered—"I certainly am." The Court then sustained an objection by stating: "I think the practices could not be binding upon the Defendant unless it is shown that the Defendant had knowledge of the practice. To say that contractors have a practice is not sufficient, and the objection is sustained." No further reference is made to the matter in the brief and in the first place, the Court in our opinion was exactly

correct in his ruling and the evidence all the way through shows that Mr. Carr's previous lease had expired and he was pleading with Mr. Gothberg to finish the job, so he could move in and Mr. Gothberg acquiesced in Mr. Carr's moving into the building even before the doors were installed so that he could have a place to put his equipment and much of the work was finished after that and there is no showing anywhere in the evidence that Mr. Gothberg was put to any extra work or inconvenience by reason of moving of the equipment into the place and if the plaintiff had been permitted to testify to this custom, then the custom as contended by him would be so highly unethical and unjust that no Court would be bound thereby and the very idea of contending that because Mr. Carr moved his equipment into the building, with the knowledge and acquiescence and consent of Mr. Gothberg, that he, Mr. Gothberg then had no obligation to finish the building. That would be ridiculous.

We do not believe there was any error committed in the ruling of the late Honorable Anthony J. Dimond, in this regard.

CONCLUSION.

In conclusion, we most respectfully contend to this Honorable Court, that the only merit in this appeal, is the cross-appeal of the defendant, Burton E. Carr, and that the plaintiff having received more money than he was entitled to, for the portion of the work,

he so sloppily and defectively performed, should have no relief whatsoever at the hands of this Honorable Court or at the hands of this or any Court because he had been overpaid several thousands of dollars. We most humbly contend that the only error committed in this case on the part of the trial Court, was in not sustaining the defendant's motion to dismiss the plaintiff's complaint at the close of all of the evidence, as to each and every count therein, and submitting the case only to the jury, on the question of the cross-complaint since all of the evidence conclusively shows that there was no actual performance of the contract and not even substantial performance therewith, therefore the plaintiff had no right of recovery until he proved substantial performance at least which he did not do.

Dated, Anchorage, Alaska,
April 12, 1954.

Respectfully submitted,
BELL & SANDERS,
BAILEY E. BELL,
WILLIAM H. SANDERS,
Attorneys for Burton E. Carr,
Appellee-Appellant.

No. 13975

United States
Court of Appeals
for the Ninth Circuit

TAM DOCK LUNG, as Guardian Ad Litem for TAM CHUNG FAY and TAM FAY HING,
Appellant,

vs.

JOHN FOSTER DULLES as Secretary of State,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-6-53

No. 13975

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WILLIAM E. CORNELL,
812 Rowan Bldg.,
458 S. Spring St.,
Los Angeles 13, Calif.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

CLYDE C. DOWNING,
ARLINE MARTIN,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

In the United States District Court in and for the Southern District of California, Central Division

No. 13,842-C

TAM DOCK LUNG, as Guardian Ad Litem for TAM CHUNG FAY and TAM FAY HING, and TAM CHUNG FAY and TAM FAY HING,

Plaintiffs,

vs.

DEAN ACHESON, as Secretary of State,

Defendant.

PETITION TO ESTABLISH NATIONALITY; DECLARATORY JUDGMENT UNDER SECTION 503 OF THE NATIONALITY ACT OF 1940

Come now the plaintiffs, Tam Chung Fay and Tam Fay Hing, individually, and by their guardian ad litem, Tam Dock Lung, and complain of the defendant and for cause of action allege:

I.

For the purpose of this action, Tam Dock Lung was appointed by the above-entitled Court and now is the guardian ad litem of plaintiffs, Tam Chung Fay and Tam Fay Hing;

II.

That each plaintiff, Tam Chung Fay and Tam Fay Hing, is a true and lawful blood child of Tam

Dock Lung, who is a citizen of the United States; that as evidence of his United States citizenship, Tam Dock Lung holds Certificate of Identity No. 21270 issued to him on November 11, 1915, at San Francisco, California, by the Immigration Service; showing his admission at San Francisco, California, as the son [2*] of a native; that said Tam Dock Lung was born on the 24th of November, 1888 (KS 14-10-21), at Don Hong Village, Toi Shan District, China;

III.

That said Tam Dock Lung was first admitted to the United States as a citizen thereof at San Francisco, California, when he arrived October 27, 1915, on the SS "Mongolia" (San Francisco file number 14776/2-5); that said Tam Dock Lung first arrived in the United States at San Francisco, California, in July, 1909, on the SS "Mongolia"; that since said first arrival the said Tam Dock Lung has made three trips from the United States to China, as follows, to wit:

Departed from San Francisco on November 21, 1914, ex SS "Siberia"; returned to San Francisco on Oct. 27, 1915, ex SS "Mongolia";

Departed from San Francisco on September 3, 1924, ex SS "President Pierce"; returned to San Francisco on June 2, 1927, ex SS "President Grant";

Departed from San Francisco on October 11, 1930, ex SS "President Jefferson"; returned to San Francisco in October, 1933, ex SS "President Coolidge";

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

IV.

That the said Tam Dock Lung was married to Fung Shee in February, 1908 (KS 34-1), at Don Hong Village, Toi Shan District, China; that said marriage was contracted in accordance with the marriage customs and ceremonies approved and legally recognized in China; that no official record of such marriage is available in China so far as the said Tam Dock Lung is informed; that the plaintiff, Tam Chung Fay, was born at Don Hong New Village, Toi Shan, China, on October 4, 1925 (CR 14-8-17); that he is now residing in Hong Kong awaiting travel documents to the United States; that the plaintiff, Tam Fay Hing, was born at Don Hong New Village, Toi Shan, China, on March 5, 1927 (CR 16-2-2); that he is now residing in Hong Kong awaiting travel documents to the United States; that each of the plaintiffs is issue of the [3] aforesaid marriage of Tam Dock Lung and Fung Shee; that the aforesaid marriage and the birth of each of said plaintiffs was duly reported to the Immigration and Naturalization Service by the said Tam Dock Lung upon each and every occasion of his examination by that Service;

V.

That the said Tam Dock Lung is and has been continuously since 1933 a resident within the Southern District of California, Central Division; that the petitioners, Tam Chung Fay and Tam Fay Hing, claim permanent residence in the Southern

District of California, Central Division, and within the jurisdiction of this Court;

VI.

That the said Tam Dock Lung caused to be filed with the American Consulate General at Hong Kong, China, on or about the 13th day of June, 1951, an application for the issuance of a United States passport or travel document in behalf of each of the plaintiffs herein; that each of said plaintiffs was advised by the American Consulate General at Hong Kong on the 8th day of January, 1952, that said petitioner's application had been denied and that "the American Consulate General declines to afford you facilities for the execution of an affidavit for the purpose of traveling to the United States"; that the plaintiffs claim that the refusal of the American Consulate General at Hong Kong to permit the said Tam Chung Fay and Tam Fay Hing to proceed to a port of entry in the United States for the purpose of having their and each of their admissibility determined by the administrative agency charged with such duty is an arbitrary and unreasonable refusal or denial of a right or privilege of a United States national;

VII.

That the defendant is the duly appointed, qualified and acting Secretary of State of the United States; that the plaintiffs' application for documentation as a United States citizen was denied by the American Consulate General at Hong Kong,

an official executive [4] of the defendant herein, in the month of January, 1952; that the Department of State through its official executive at Hong Kong did, on the 8th day of January, 1952, deny the plaintiffs, and each of them, a right or privilege as a national of the United States;

VIII.

That this complaint is filed and these proceedings are instituted against the defendant under Section 503 of the Nationality Act of 1940 (54 Stat. 1171, 1172, 8 U.S.C. 903), for a judgment declaring the plaintiffs and each of them to be a national of the United States;

IX.

That neither of the plaintiffs has ever committed any act or executed any instrument of expatriation or renounced his United States citizenship; that the plaintiffs and each of them are entitled to be declared a national of the United States;

X.

That the plaintiff, Tam Chung Fay, and the plaintiff, Tam Fay Hing, each claims to be a United States citizen and/or national, such citizenship and/or nationality having been acquired pursuant to the provisions of Section 1993, Revised Statutes of the United States, as amended by the Act of May 24, 1934, and Section 201(g) of the Nationality Act of 1940 (8 U.S.C.A. 601(g));

Wherefore, each plaintiff prays for judgment declaring him to be a national of the United States

and for such other and further relief as may be just and proper.

BRENNAN & CORNELL,

By /s/ BERNARD BRENNAN,
Attorneys for Plaintiffs.

Duly verified.

[Endorsed]: Filed February 18, 1952. [5]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, Dean Acheson, as Secretary of State, through his attorneys, Walter S. Binns, United States Attorney for the Southern District of California; and Clyde C. Downing and Arline Martin, Assistants United States Attorney for the Southern District of California, and in answer to plaintiff's Complaint herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph I of plaintiff's Complaint.

II.

Denies the allegations contained in Paragraphs II, III, IV, V, VI, IX and X of plaintiffs' Complaint.

III.

Referring to the allegations contained in Paragraph VII of plaintiff's Complaint, admits that the

defendant is the duly qualified and acting [11] Secretary of State of the United States; denies each and every other allegation therein contained.

IV.

Defendant neither admits nor denies the allegations contained in Paragraph VIII, the same being a conclusion of law.

For a Further, Separate and Second Defense, Defendant Alleges:

I.

The Complaint of plaintiff fails to state a claim upon which relief can be granted.

Wherefore, defendant prays for a judgment dismissing said Complaint and denying the relief prayed for therein.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ ARLINE MARTIN,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed March 31, 1952. [12]

[Title of District Court and Cause.]

MINUTES OF THE COURT—DEC. 30, 1952

Present: The Honorable Harry C. Westover,
District Judge.

Proceedings: For further trial. Both sides answer ready. Court orders trial proceed.

The following witnesses are sworn and testify on behalf of Plaintiff:

Tam Dock Lung,
Tam Chung Fay,
Tam Hin Soon,
Tam Fay Hing.

(Both sides rest.)

The following exhibits are admitted into evidence:

Plaintiff:

7 (translation to be furnished later).

The Court Finds: that plaintiffs have not sustained the burden of proof and orders judgment in favor of defendant and against plaintiffs; attorney for defendant to prepare findings of fact, conclusions of law, and judgment.

EDMUND L. SMITH,
Clerk;

By /s/ E. M. ENSTROM, JR.,
Deputy Clerk. [14]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case having come on for trial as to each of the plaintiffs, Tam Chung Fay and Tam Fay Hing, and having been tried on December 23, 24 and 29, 1952, before the Honorable Harry C. Westover, judge presiding, without a jury, the plaintiffs appearing by their attorneys, Brennan and Cornell, by J. J. Irwin, and the defendant appearing by his attorneys, Walter S. Binns, United States Attorney; Clyde C. Downing and Arline Martin, Assistants U. S. Attorney, and evidence having been introduced on behalf of the plaintiffs and the defendant, and the Court having considered the same, and having heard the arguments of counsel and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

For the purposes of this action, Tam Dock Lung was appointed by the above-entitled Court as the guardian ad litem of plaintiffs, Tam Chung Fay and Tam Fay Hing. [15]

II.

That the defendant, Dean Acheson, is the duly appointed, qualified and acting Secretary of State of the United States and as such is the head of the United States Department of State. That on

or about January, 1952, said United States Department of State refused to document each of the plaintiffs herein as citizens or nationals of the United States on the ground that said plaintiffs and each of them were not citizens or nationals of the United States.

III.

That Tam Dock Lung, alleged father of each of said plaintiffs, on or about November, 1915, was issued a Certificate of Identity, No. 21270 by the Immigration and Naturalization Service at San Francisco, California, and he was, on or about that date, admitted to the United States from China as the son of a native.

IV.

That on or about February, 1952, said Department of State of the United States issued to each of said plaintiffs Certificates of Identity, pursuant to the provisions of Section 503 of the Nationality Act of 1940 (8 U.S.C. 903) which Certificates of Identity state that the nationality of each of said plaintiffs was pending before the United States District Court and that each of said plaintiffs may be admitted to the United States with such Certificate, upon condition that each of said plaintiffs be subject to deportation in case it is decided by said Court that said plaintiffs are not nationals of the United States. That each of said plaintiffs entered the United States as temporary visitors pursuant to the conditions of said Certificates of Identity. Each of

said plaintiffs arrived in the United States on or about April 14, 1952, and was temporarily released on bond of one thousand ($1,000.00) dollars to the Immigration and Naturalization Service, and since that date has been residing in Los Angeles, California.

V.

The evidence adduced by each of said plaintiffs and their witnesses, Tam Dock Lung, alleged father; and Tam Hin Soon, alleged brother, contains so many discrepancies relating to subjects about which each and all of said persons and [16] witnesses should be in agreement, and the credibility of the testimony of each of said plaintiffs and of each of said witnesses has been so impeached that the Court does not believe the testimony of each of said plaintiffs or said witnesses and there is no credible evidence to support plaintiffs' claims that they are United States citizens.

VI.

That each of said plaintiffs was born in China; that the plaintiff, Tam Chung Fay, is not the son of Tam Dock Lung, and the plaintiff Tam Fay Hing, is not the son of Tam Dock Lung, and neither of said plaintiffs are citizens or nationals of the United States.

Conclusions of Law

I.

That each of said plaintiffs has been denied the right or privilege as a national of the United States by the defendant, the United States Department of

State, upon the ground that each of said plaintiffs is not a national of the United States.

II.

That jurisdiction of this Court in the above-entitled action is pursuant to the Act of October 14, 1940, Chapter 876, Title 1, subchapter 5, Section 503, 54 Stat. 1171 (8 U.S.C. 903).

III.

That the burden is on each of said plaintiffs to establish his claim to United States nationality and citizenship and each of said plaintiffs has failed to sustain said burden and the Court concludes that the plaintiff, Tam Chung Fay, is not a national or citizen of the United States and is not a son of Tam Dock Lung; and that the plaintiff, Tam Fay Hing, is not a national or citizen of the United States and is not a son of Tam Dock Lung.

IV.

Judgment should be entered in favor of the defendant and against the plaintiff and each of them in the above-entitled action, dismissing the Complaint of each plaintiff and adjudging that each of said plaintiffs are not citizens of [17] the United States, and directing that each of said plaintiffs be deported to China pursuant to the Certificates of Identity upon which each of said plaintiffs were admitted to the United States and that upon compliance with subject Order that said bonds in the sum of one thousand ($1,000.00) dollars be exoner-

ated; that costs be awarded the defendant herein.

Dated: This 12th day of February, 1953.

/s/ HARRY C. WESTOVER,
Judge, United States District Court.

Copy received.

Affidavit of service by mail attached.

[Endorsed]: Filed February 12, 1953. [18]

In the United States District Court in and for the Southern District of California, Central Division

No. 13842-HW

TAM DOCK LUNG, as Guardian Ad Litem for TAM CHUNG FAY and TAM FAY HING; and TAM CHUNG FAY and TAM FAY HING,

Plaintiffs,

vs.

DEAN ACHESON, as Secretary of State,

Defendant.

JUDGMENT

The above-entitled case having come on for trial and having been tried on December 23, 24, and 29, 1952, before the Honorable Harry C. Westover, judge presiding without a jury, the plaintiffs ap-

pearing by their attorneys, Brennan and Cornell, by J. J. Irwin, and the defendant appearing by his attorneys, Walter S. Binns, United State Attorney; Clyde C. Downing and Arline Martin, Assistants U. S. Attorney, and the Court having considered the arguments of counsel, and the Court having considered the same and the causes having been argued and submitted to the Court for its decision, and the Court having heretofore made and filed its Findings of Fact and Conclusions of Law and having ordered that a Judgment be entered in accordance therewith;

Now, Therefore, It Is Ordered, Adjudged and Decreed:

I.

Judgment is hereby entered in favor of the defendant and against each of the plaintiffs, Tam Chung Fay and Tam Fay Hing, in the above-entitled action, [20] and it hereby is adjudged that the action of each of said plaintiffs, Tam Chung Fay and Tam Fay Hing, shall be and the same is hereby dismissed and it is further adjudged that each of said plaintiffs, Tam Chung Fay and Tam Fay Hing, are not citizens or nationals of the United States.

It is hereby further ordered that each of said plaintiffs, Tam Chung Fay and Tam Fay Hing, be deported to China, pursuant to the conditions of Certificates of Identity upon which they were admitted to the United States and that upon compliance with this Order, that the bond of $1,000.00 furnished by each of said plaintiffs to the Immigra-

tion and Naturalization Service be exonerated; and that the defendant recover costs herein.

Costs taxed at $20.00.

Dated: This 12th day of February, 1953.

/s/ HARRY C. WESTOVER,
Judge, United States District Court.

Copy received.

[Endorsed]: Filed February 12, 1953.

Docketed and entered February 13, 1953. [21]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(B)

Notice Is Hereby Given that:

Tam Dock Lung, as Guardian Ad Litem for Tam Chung Fay and Tam Fay Hing, plaintiffs above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on February 13, 1953.

/s/ WILLIAM E. CORNELL,
Attorney for Plaintiffs.

[Endorsed]: Filed April 10, 1953. [22]

[Title of District Court and Cause.]

ORDER EXTENDING TIME ON APPEAL

Upon motion by counsel for plaintiffs, and there being no objection from counsel for the defendants, and good cause appearing therefor;

It Is Ordered that the time to file the record on appeal is hereby extended 90 days from the Notice of Appeal herein.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed May 19, 1953. [23]

[Title of District Court and Cause.]

STIPULATION FOR SUBSTITUTION OF JOHN FOSTER DULLES, AS SECRETARY OF STATE, AS PARTY DEFENDANT

It Is Hereby Stipulated, pursuant to the provisions of Rule 25 (d), Federal Rules of Civil Procedure, that John Foster Dulles, as Secretary of State, be substituted as party defendant in the above-entitled case.

Dated: July 20, 1953.

/s/ WILLIAM E. CORNELL,
Attorney for Plaintiffs.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division;

By /s/ ARLINE MARTIN,
Assistant U. S. Attorney,
Attorneys for Defendant.

It Is So Ordered:

This 20th day of July, 1953.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed July 20, 1953. [24]

In the United States District Court, Southern District of California, Central Division

No. 13842-C

TAM DOCK LUNG, as Guardian Ad Litem for TAM CHUNG FAY and TAM FAY HING,
Plaintiff,

vs.

DEAN ACHESON, as Secretary of State,
Defendant.

Honorable Harry C. Westover, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:
JOHN J. IRWIN, ESQ.

For the Defendant:

WALTER S. BINNS,
United States Attorney; by

ARLINE MARTIN,
Assistant United States Attorney.

December 23, 1952, 10:00 A.M.

The Clerk: Tam Dock Lung vs. Acheson, No. 13842.

Mr. Irwin: Ready for the plaintiffs, your Honor.

Miss Martin: Ready for the Government.

Mr. Irwin: By agreement with Miss Martin of the United States Attorney's office, subject to the Court's approval, we propose to try first case No. 13842.

The Court: It is perfectly all right with me.

Mr. Irwin: We have selected that one because that contains two plaintiffs. May the other cases trail?

The Court: The other two cases may trail. We probably won't get to them until some time next week. I expect to be able to dispose of these cases before the first of the year, unless counsel drag out these cases unduly.

Mr. Irwin: I have never been noted for that, your Honor.

The Court: We have adopted the procedure in these cases of excluding all witnesses except the plaintiff. We have the direct examination of all the witnesses before there is any cross-examination.

Mr. Irwin: That is quite agreeable, your Honor.

The Court: That eliminates the accusation that the witnesses got together after cross-examination and fixed up the stories.

Mr. Irwin: That is quite understandable, your Honor. [3*]

The Court: It is for the protection of the plaintiffs as well as the government.

Mr. Irwin: It is an assurance to counsel, because we are dealing in a foreign language. When your Honor speaks of the plaintiffs, you mean the guardian ad litem, I take it.

The Court: The guardian ad litem is usually a witness.

Mr. Irwin: He will be a witness.

The Court: I am talking about the boys.

Mr. Irwin: There are two boys in this case.

The Court: I will allow the two boys to remain in the court room and exclude the guardian, or I will allow him to remain in the court room and exclude the two boys.

Mr. Irwin: The guardian will be the first witness. It really makes no difference.

The Court: Let's exclude the two boys then. The guardian is really the plaintiff. We will exclude everybody except the guardian ad litem.

Mr. Irwin: Will the bailiff show them where to go?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: We'd better have the interpreter tell them.

Mr. Irwin: Shall the interpreter be sworn and then advise them?

The Court: You can advise them before you swear her to tell them where to go.

I notice the defendant is Dean Acheson. You have brought this suit against him. Usually it is against the Attorney [4] General. Is that going to make a difference?

Miss Martin: It is only against the Attorney General when the people are here. But in this case the State Department has denied them a passport from China and they are here on certificates of identity. So the State Department is the proper party defendant.

The Court: Then we have the proper defendant. You may swear the interpreter.

(Lily L. Chan was thereupon duly sworn as interpreter.)

Mr. Irwin: May the record show, your Honor, I would like to have you inquire whether she ever met me before until this morning? Likewise, it is my understanding she has never talked to any of the witnesses or the plaintiffs in this case.

The Court: You are not acquainted with any of the witnesses in this case, are you?

Mrs. Chan: No.

The Court: You don't know the boys in the case?

Mrs. Chan: I did not know them until this morning.

The Court: The interpreter will get acquainted

with you before you get through with these cases. The interpreter is already acquainted with the District Attorney, so that is no disqualification.

Mr. Irwin: The first witness will be Tam Dock Lung.

May I speak to your Honor off the record on a personal situation? [5]

The Court: Yes. Off the record.

(Discussion off the record.)

Mr. Irwin: Your Honor, may I inquire of your preference here on this? The District Attorney has kindly furnished me with photostats of Immigration Department records of the plaintiffs.

Miss Martin: I will stipulate no foundation need be laid.

The Court: You can offer them in evidence.

Mr. Irwin: That might help to conduct the examination.

The Court: They may be received.

Mr. Irwin: I hand to the clerk the first document entitled "Exempt Class Landed Direct from Steamer," bearing date October 27, 1915, a photostat.

The Court: It may be received and marked Exhibit 1.

The Clerk: Plaintiffs' Exhibit 1 in evidence.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 1.)

Mr. Irwin: Next I hand to the clerk Form 2505, United States Immigration Service. This photostat has the month obscured. The day is the 4th and the year is 1924. It is case No. 12017.

The Court: It may be received and marked Plaintiffs' Exhibit 2.

The Clerk: So marked, your Honor. [6]

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 2.)

Mr. Irwin: The next is a form No. 2602 of the U. S. Immigration Service, photostat of a document bearing date June 2, 1927.

The Court: It may be received and marked Exhibit 3.

The Clerk: So marked.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 3.)

Mr. Irwin: The next is a Form 2505, U. S. Immigration Service, a photostat bearing date August 30, 1930.

The Court: It may be received and marked Exhibit 4.

The Clerk: So marked.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 4.)

Mr. Irwin: Next is a document, photostat, Form 2602, U. S. Immigration Service, bearing date October 30, 1933.

The Court: It may be received and marked Exhibit 5.

The Clerk: So marked, Plaintiffs' Exhibit 5.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 5.)

The Court: It may be possible for you to stipulate to a lot of the facts in this case.

Mr. Irwin: I was going to inquire. I understand Miss Martin is willing to stipulate with me that the guardian, Tam [7] Dock Lung, the alleged father, was heretofore admitted as a citizen of the United States. It appears in one of the photostats, Miss Martin.

Miss Martin: Yes. We will stipulate he was admitted in the United States in November, 1950, on a certificate No. 21270 at San Francisco by the Immigration and Naturalization Service as the son of a native.

Mr. Irwin: As the son of a citizen.

Miss Martin: As a son of a native is how it reads.

Mr. Irwin: Thank you, Miss Martin. Would you follow these photostats with me and perhaps we can condense them. Summarizing, may it be stipulated the photostats which have just been received, Plaintiffs' Exhibits 1 to 5, show in part that the plaintiff first came to the United States in 1909. That he made three trips thereafter to China. On the first trip he left the United States in 1914, returning in 1915. The second, he left in 1924 from San Francisco, and returned in 1927. The third trip, he left August 30, 1930, and returned October 30, 1933.

Is that a correct summary as to the departures and returns as reflected by the immigration record and show in the Plaintiffs' Exhibits 1 to 5?

Miss Martin: With the exception that the last

time he left it was October 11, 1930, rather than the date you gave.

Mr. Irwin: I will be happy to accept the correction. [8]

Miss Martin: We will then so stipulate.

TAM DOCK LUNG

called as a witness by and on behalf of the plaintiffs herein, having been first duly sworn, was examined and testified through the interpreter as follows:

The Clerk: Your name is Tam Dock Lung?

The Witness: Yes.

The Court: I notice there are two older children, Tam Hin Sik and Tam Jing Hing. Have they been admitted?

Mr. Irwin: First of all, may we dispose of this, that according to the records, on one instance he shows the oldest son died. I don't ask you to accept the truth of that, but may it be stipulated Plaintiffs' Exhibit 5, which is the statement made to the U. S. Immigration Service upon the plaintiff's last return to the United States, shows that he indicated and stated under oath that his eldest son, Tam Hin Sik, had died in Shanghai in January, 1932?

Miss Martin: I will stipulate that fact. We will stipulate that the plaintiff signed and filled out all of these statements, Exhibits 1 to 5, and stated the facts as therein contained.

Mr. Irwin: Thank you. Then I will just have one question on that. As to the second son, the records indicate, which is the fact, that the second son, Tam Hin Soon, has heretofore [9] been ad-

(Testimony of Tam Dock Lung.)

mitted to the United States as the son of the plaintiff.

Miss Martin: So stipulated.

The Court: He was admitted when?

Mr. Irwin: 1935. Have you got the exact date there?

Miss Martin: October 27, 1935.

The Court: All right. One other question. Is the wife still living?

Mr. Irwin: That is my information.

The Court: Is she still in China?

Mr. Irwin: Yes, your Honor. May I proceed?

The Court: Yes, you may proceed.

Direct Examination

By Mr. Irwin:

Q. Is your wife still living? A. Yes.

Q. She is still in China?

A. In China, in Hong Kong, China.

Q. Your oldest boy died? A. Yes.

Q. Your second son is in the United States?

A. Yes, in Los Angeles.

Q. The two boys who are applying for entry as your sons are Tam Chung Fay and Tam Fay Hing, is that true? [10] A. Yes.

Q. Do you have any younger children than those two boys? A. Yes.

Q. What are they? Boys or girls?

A. Two boys and one girl.

Q. Where is the girl?

(Testimony of Tam Dock Lung.)

A. The daughter is in Hong Kong. The son is in Canton, China, studying.

Q. The name of the daughter is the one listed as Tam Mow Don? A. Yes.

Q. Is the name of the son still in China who is studying at Canton Tam Jing Hing?

A. Yes, Tam Jing Hing.

Mr. Irwin: I ask to have this marked for identification. It is a photograph, your Honor.

The Court: It may be marked for identification.

The Clerk: Plaintiffs' Exhibit 6 for identification.

(The photograph referred to was marked Plaintiffs' Exhibit No. 6 for identification.)

Q. (By Mr. Irwin): I show you Plaintiffs' Exhibit 6 for identification and ask you if you can tell the court who the people are in that picture?

A. Yes. The one in the center in front is my wife. [11] The one on her right, sitting position, is Mow Don, the daughter.

Q. That is the daughter in China?

A. Yes, the one in China. The middle one is Tam Chung Fay, back of my wife.

Q. That is one of the applicants before the court here today?

A. One of the applicants. At left standing, the left side of my wife standing, is Tam Fay Hing.

Q. That is the other applicant here before the court?

A. Yes. That is these two here (indicating).

Q. How did you receive that picture?

(Testimony of Tam Dock Lung.)

A. They brought it over.

Q. When you say "they," you mean the boys?

A. Yes, the two sons brought it over.

Q. Therefore, you do not know yourself as to just where it was taken so we will have to ask the boys for that, is that true?

A. The sons know where it was taken.

Q. You identify the older lady of the two in this Exhibit 6 for identification as your wife. What is her name? A. Fung Shee.

Q. When were you married?

A. K. S. 34, first month, 39th day.

Q. What year? [12]

The Interpreter: It is March 1, 1908.

The Court: That is K. S. 34. What was the month and date?

The Witness: First month, 29th day.

The Interpreter: That is the equivalent of 1908, March 1.

The Court: 1908 or 1906?

The Interpreter: 1908.

Mr. Irwin: That is what appears in the record, too, your Honor, that he first showed there in the photostat.

Q. Did you say 34 K. S. 1-29? A. Yes.

Mr. Irwin: The same date appears as given by the witness, your Honor, in this exhibit.

The Court: Yes, I see that.

Q. (By Mr. Irwin): This lady you have identified as your wife and given her name, in Plaintiffs' Exhibit 6, where were you married?

(Testimony of Tam Dock Lung.)

A. Don Hong Village, Toy Shan, Hay Yin, Canton, China.

The Court: Can we locate the village? Where is it from Hong Kong?

Mr. Irwin: I say you have a map and everything, Judge.

The Interpreter: Toy Shan is in Canton or Kwangtung Province, opposite Hong Kong.

The Court: What is the nearest large [13] village?

Miss Martin: Are you asking the witness or the interpreter.

The Court: I am just asking for information.

Mr. Irwin: I have no objection if you inquire of the interpreter.

The Court: Is Toy Shan across the bay from Hong Kong? Ask the witness that.

The Interpreter: Are you asking for Toy Shan or Hay Yin?

Mr. Irwin: First, where is the village with reference to the nearest large city?

The Witness: It is not near any particular city, but it is a section within Hay Yin. It is like a district.

The Court: Is it east or west of Hong Kong?

The Witness: West of Hong Kong. Hong Kong is east of us.

The Court: To go from Hong Kong to Toy Shan, do you go across the bay?

The Witness: You have to cross the water to go to Hay Yin.

(Testimony of Tam Dock Lung.)

The Court: When you go from Hong Kong to Hay Yin, do you go by boat or train or car?

The Witness: By steamer.

The Court: All right. I just wanted to know the general direction. [14]

Miss Martin: I would like to clear up something. I thought the interpreter said it was near Canton. The witness has been talking in terms of Canton.

The Court: It could be near Hong Kong and near Canton.

Mr. Irwin: I was going to go into that.

The Court: It is the apex of a triangle between the three places, according to my map.

Q. (By Mr. Irwin): This village where you were married, was that your village where you had your home? A. Yes, it is my home.

Q. Were you married according to Chinese custom? A. Yes.

Mr. Irwin: Is there any question about whether they were married?

Miss Martin: It is up to you. It's your case.

Mr. Irwin: Do you make a point of it?

Miss Martin: I don't know. I don't know whether I will make a point of it.

Q. (By Mr. Irwin): Will you tell me how you and your wife were married? Just what were the proceedings?

A. The ceremony we had was we drank together. We drank together.

Q. Was that the ceremony that was recognized

(Testimony of Tam Dock Lung.)

as a legal marriage at the time you and your wife were married in 1908? A. Yes. [15]

The Court: No issue has ever been raised about sufficiency of the marriage ceremony.

Mr. Irwin: I asked counsel and she couldn't tell me whether she would object to lack of foundation.

The Court: We all recognize that these marriages are by custom, rather than by church or by state.

Mr. Irwin: That is my understanding, your Honor.

Q. Now, then, you came to the United States first in 1909? This is preliminary.

Miss Martin: All right, because I will object if you lead him.

Q. (By Mr. Irwin): You came to the United States first in 1909. When you first came to the United States, did you leave your wife in your home village? A. Yes.

Q. You first returned to China, according to the photostat record of the United States Immigration Service, in 1914. When you went back to China in 1914, where did you go?

A. I went back to Don Hong Village.

Q. Which was your home? A. Yes.

Miss Martin: Let's don't have any more leading questions.

Mr. Irwin: He testified that is where he lived.

Miss Martin: I will object to counsel testifying or leading. [16]

Q. (By Mr. Irwin): Referring again to Plain-

(Testimony of Tam Dock Lung.)

tiffs' Exhibit 6, when you returned to Don Hong Village in 1914, was this lady whom you have identified as your wife there? A. She was home.

Q. How long did you stay in your village at that time? A. Back and forth, one year's time.

Q. Did you and your wife live together during that period when you returned in 1914?

A. Yes.

Q. When did you return to the United States?

A. C. R. 4.

The Interpreter: 1915.

The Court: Now, may I ask a question?

Mr. Irwin: Certainly, your Honor.

The Court: When you went back to China in 1914, went back to your village, at that time did you have a child?

The Witness: It wasn't born yet.

The Court: It wasn't born yet. All right.

Mr. Irwin: I may clear that up, and I won't lead, with your Honor's permission.

The Court: Just a minute. Let me ask the witness a question.

Mr. Irwin: Certainly.

The Court: You say you came to the United States originally in 1909. You also say you were married in 1908. You were [17] married before you came to the United States the first time, is that correct?

The Witness: That's right. I was married then.

The Court: When you came to the United States the first time in 1909, did you have a child?

The Witness: Yes.

(Testimony of Tam Dock Lung.)

The Court: What was the name of that child?

The Witness: Tam Hin Sik.

The Court: When was Tam Hin Sik born?

The Witness: First year, first month, 15th day.

The Interpreter: 1909, February 5.

The Court: How long after you came to the United States was your son born?

Mr. Irwin: Would your Honor permit this suggestion? Which trip? He said the first child was born when he left.

The Court: He came to the United States in 1909. What month and what day did you come to the United States?

The Witness: It was Sun Tung, the first year, fourth month, and I can't recall the exact date.

The Court: You say the first year, fourth month?

The Witness: Sun Tung, first year, fourth month.

The Court: He said something about arriving.

Miss Martin: Translate that to English, please.

The Court: Will you translate the first year, fourth month, please? [18]

The Interpreter: From May 19 on to June 17th.

The Court: What does the record show? It shows 1909.

Mr. Irwin: Yes, and that is what he says.

The Court: What was the date?

Mr. Irwin: I think the record shows—let me see Plaintiffs' Exhibit 1, your Honor.

(Testimony of Tam Dock Lung.)

The Court: That doesn't do any good, I don't think.

Miss Martin: We could not find in the immigration files the original arrival statement.

The Court: All right. Now, let's get back to this trip when you came to the United States in 1909. You said it was the first year and the fourth month. When you came to the United States in 1909, was your child Tam Hin Sik then born?

The Witness: Yes.

The Court: How old was he?

The Witness: About three months old.

The Court: All right.

Mr. Irwin: Thank you, your Honor. I had skipped that because that one is dead.

Q. I was asking you about your trip to China in 1914. The record shows a return to the United States in 1915. I am just giving that as preliminary. A. That's right.

Q. I believe you told the judge that during that trip, at the time you left China, no other child had been born, is [19] that right?

A. The second son was not born yet.

Q. Was your wife pregnant when you left China? A. Yes.

Q. When did you arrive back in the United States on that trip?

A. I return C. R. 4, the eighth month.

The Interpreter: C. R. 4 would be 1915. The eighth month would be from September 9 to October 8.

(Testimony of Tam Dock Lung.)

Q. (By Mr. Irwin): May I ask this question? At the time you returned to the United States in 1915, did you fill out some papers for the immigration authorities?

The Court: There is no argument about that.

Mr. Irwin: Except he is off on the date a couple of weeks, your Honor.

The Court: Well, he gives the right year, doesn't he?

Mr. Irwin: Yes.

The Court: He said September or October.

Mr. Irwin: It was October 27th.

The Court: The record is the best evidence, rather than his memory.

Mr. Irwin: I was going to bring out his memory was better at that time than today.

The Court: Go ahead.

Q. (By Mr. Irwin): After you returned in September or [20] October, 1915, did you thereafter learn whether or not a second child had been born to your wife? A. Yes.

Q. How did you find that out?

A. After I returned to the United States, my wife wrote and informed me that the baby is about a month old.

Q. Did she tell you what the baby was, a boy or a girl? A. It was a son.

The Court: Supposing we find out what the name of this child was?

Q. (By Mr. Irwin): What name was given this second son of yours? A. Tam Hin Soon.

(Testimony of Tam Dock Lung.)

The Court: What was the date of birth?

Q. (By Mr. Irwin): What was the date of your second son's birth? A. C. R. 4-9-3.

The Interpreter: 1915, October 11.

Q. (By Mr. Irwin): You next returned to China in 1924, according to the record. Is that true?

A. Yes.

Q. And when you went back to China, where did you go? A. Also went back to Don Hong.

The Court: When did he return to China?

Mr. Irwin: The second time, your Honor, was 1924. [21]

Miss Martin: May we have the month for that?

Q. (By Mr. Irwin): Will you give us the exact time in 1924 for the record?

A. C. R. 24, eighth month, I left San Francisco.

The Interpreter: C. R. 24 would be——

The Witness: The second time is C. R. 13.

Miss Martin: Will you translate C. R. 24-8?

The Interpreter: 1935, and four would be any time from May——

Miss Martin: He didn't say four, he said eight.

The Interpreter: Excuse me. Eight would be August 29 to September 27.

Mr. Irwin: 1935?

Miss Martin: 1935. C. R. 24-8 has been translated as August or September, 1935.

Mr. Irwin: I will restate the question. We have the record in his own handwriting right here.

Q. Will you please give us again the year that you returned to China the second time?

(Testimony of Tam Dock Lung.)

Miss Martin: And the month.

Mr. Irwin: Let's get the year first.

The Witness: 1924 was for the American date.

Miss Martin: Then I think the record will show that the interpreted it as a C. R. date, a Chinese date.

The Court: That is true. It is given as 1924, but there [22] was nothing to indicate to the interpreter that the witness was using the American date.

Miss Martin: There isn't?

The Court: Let's have the return to China the second time in the Chinese date, not the American date, but in the Chinese date.

The Witness: C. R. 13—eighth month, third day.

The Court: Translate that.

The Interpreter: It would be 1924, September 1.

The Court: September what?

The Interpreter: September 1.

Q. (By Mr. Irwin): When you left the United States on that date and returned to China, where did you go?

A. Went back to the Don Hong Village.

Q. Who of your family did you find there when you returned? A. My wife and children.

The Court: What children?

The Witness: The second son.

Q. (By Mr. Irwin): What about the first son, the one that was born in 1909? Where was he?

A. The older son went to Canton.

Q. When did he go to Canton?

(Testimony of Tam Dock Lung.)

A. I do not know the exact date.

Q. Let's see if we are clear. At the time you returned [23] to China in 1924, do we understand that your No. 1 son, your oldest son, had already left your native village? A. That's right.

Q. Who was left of your family when you arrived?

A. My wife was at the village home and the second son was in the village, also, attending school.

The Court: At that time, how old was the second son?

The Witness: About 10 years old.

Q. (By Mr. Irwin): When you arrived, who did your wife tell you this 10-year old child was?

A. When he came home in the afternoon from school, my wife informed me that this is my son.

Q. When you arrived on this trip, this is the second trip——

The Court: Just a minute. May I ask a question?

Mr. Irwin: Certainly, your Honor.

The Court: This was the first time you saw this second son?

The Witness: That was the time.

Q. (By Mr. Irwin): Now, how long did you stay at home with your wife on this trip?

A. Almost three years.

Q. Were there any children born of your wife and yourself during this trip?

A. Yes. [24]

Q. How many? A. Two.

Q. What were their names, please?

(Testimony of Tam Dock Lung.)

A. The third one was Tam Chung Fay. The fourth one is Tam Fay Hing.

Q. When was the third son born?

A. C. R. 14-8-17.

The Interpreter: October 4, 1925.

Q. (By Mr. Irwin): When was the fourth son born? A. C. R. 16-2-2.

The Interpreter: March 5, 1927.

Q. (By Mr. Irwin): Were both these boys born to your wife, Fung Shee? A. No error.

The Interpreter: In Chinese, when you say no error, that means that is true.

Q. (By Mr. Irwin): During this period you were home from 1924, when you returned, when did you come back to the United States?

A. C. R. 16-4-3.

The Interpreter: May 3, 1927.

Miss Martin: Will you double-check that?

Mr. Irwin: Yes, please ask that again. Let me ask this.

Miss Martin: Wait a minute. [25]

The Witness: The eighth month, I think it is the 16th year, eighth month.

Miss Martin: What day?

The Witness: I don't remember the day.

The Interpreter: Eighth month would be from August 27 to September 25.

The Witness: I don't remember. Wait a minute. C. R. 16—I left China the fourth month.

Miss Martin: Will the interpreter just check the English translation of C. R. 16-4-3?

(Testimony of Tam Dock Lung.)

The Interpreter: 1927, May 3.

Q. (By Mr. Irwin): I want to ask this. There might be a confusion. When did you leave China to come to the United States?

A. The fourth month.

Mr. Irwin: And that is what now?

The Interpreter: Could be the entire month of May.

Q. (By Mr. Irwin): I believe you testified your fourth son was born March 5, 1927, is that right?

The Court: No, March 5, 1926, I have it.

Miss Martin: No.

Mr. Irwin: 1927, your Honor.

The Interpreter: C. R. 16, your Honor, 1927 is the American.

Q. (By Mr. Irwin): At the time you left China in 1927 [26] two more boy children had been born to you and your wife? A. That's right.

Q. You told us when you returned in 1924, you found your wife and a boy about 10 years old who, your wife said, was the second son, is that true?

A. Yes.

Q. Did that boy, whom your wife identified as your second son, live with your wife and yourself from the time you arrived until when you left in 1927? A. We three lived in the same house.

Q. When you left in 1927, leaving your wife and your second son and your third and fourth sons, with whom did your wife and children make their home?

(Testimony of Tam Dock Lung.)

The Interpreter: You want to know the second, third and fourth sons?

Mr. Irwin: He said when he went back in 1924 and lived at home with the wife and second son, two children were born during that trip. I want to know when he left, he said he left in 1927, with whom was his wife and the three children living.

Miss Martin: Don't you think we ought to have you phrase a question?

The Court: Yes. Rephrase your question.

Q. (By Mr. Irwin): When you left China in May of 1927, with whom did your wife and three children stay? [27]

A. They all lived together in the same house.

Q. Who looked after them? Who took care of them when you were gone?

A. My wife looks after them.

The Court: Who owned this house?

The Witness: My father built it.

Q. (By Mr. Irwin): Did you have any brothers? A. Yes.

Q. Where were they living in 1927?

A. They were all in Los Angeles.

Q. There were no brothers living in China when you left in 1927, no brothers of yours, is that right?

A. No.

The Court: May I ask a question?

Mr. Irwin: Certainly.

The Court: Were there any children of any brothers living in this village in China in 1927?

The Witness: No.

(Testimony of Tam Dock Lung.)

Q. (By Mr. Irwin): You have told us you returned to the United States, leaving China in May, 1927. Did you make another trip, a third trip to China? A. Yes.

Q. When did you leave the United States on your third trip to China?

A. C. R. 19, eighth month, 20th day. [28]

The Court: Before you translate that, is that C. R. 19 Chinese or is it United States 19?

The Witness: C. R. 19 is the Chinese date.

The Court: All right. Now translate it.

The Interpreter: It would be October 11, 1930.

The Court: It's pretty near 11:00 o'clock and maybe this is a good place to stop for our morning recess.

Mr. Irwin: Thank you, your Honor.

The Court: We will now recess until 10 minutes after 11:00.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Irwin): At the time of the recess, you were just leaving for China on your third trip. Where did you go after leaving San Francisco in 1930 for China? Where did you go when you got to China? A. To the same village.

Q. And who of your family was there when you arrived? A. My children, all my family.

Q. By your family, will you please name them again now? Who was there?

A. The wife was home, a second boy was at school, and the third and fourth were home.

(Testimony of Tam Dock Lung.)

Q. The second boy was at school where?

A. Don Hong Village school, in a school at Don Hong [29] Village.

Q. That is your village?

A. The old village, Don Hong Old Village.

Q. Did the second son stay at home at nights when you got there?

A. He returned home to live.

The Court: May I ask a question?

Mr. Irwin: Please do, your Honor.

The Court: You say you returned to Don Hong Village. Was there an old and a new village?

The Witness: Our home was at the new Don Hong Village.

The Court: The new village?

The Witness: Yes. The son went to the old Don Hong Village for schooling.

Q. (By Mr. Irwin): How far apart were they?

The Witness: When you walk, it takes about five or 10 minutes.

The Court: The family home you lived in, the home that your children were born in, was that home in the new village?

The Witness: They were born in the new village.

Q. (By Mr. Irwin): What time of the day did you arrive home? A. Before noon.

Q. When you arrived, the second boy was at school, is that right? [30]

A. Yes. He has not come home yet.

Q. Did you see the second boy the same day that you arrived home?

A. Yes, I saw him the same day.

The Court: How old was your second boy?

(Testimony of Tam Dock Lung.)

The Witness: 16.

Q. (By Mr. Irwin): You said that at home was your wife and the third and fourth sons. Did I so understand? A. That's right. No error.

The Court: How old was the third son?

The Witness: About 6.

The Court: How old was your fourth son?

The Witness: About 4.

Q. (By Mr. Irwin): How long did you stay at home on this trip?

A. About three years, three to four years.

Q. Were there any children born to your wife and you during this stay in China? A. Yes.

Q. How many? A. One boy, one girl.

Q. What was the name of the boy?

A. Tam Jing Hing, and the daughter was Tam Mow Don.

Q. When was the boy born? This would be the fifth boy. When was that boy born? [31]

A. C. R. 20-1-26.

The Interpreter: March 14, 1931.

Q. (By Mr. Irwin): When was the girl born?

A. C. R. 21, 10th month, 22nd day.

The Interpreter: November 19, 1932.

Q. (By Mr. Irwin): When you arrived on that trip in 1930, where was your first son?

A. Shanghai.

Q. When you left China in 1933, was your oldest boy living or dead? A. Died.

Q. Where did he die? A. Shanghai.

Q. When you left China in 1933 and left your

(Testimony of Tam Dock Lung.)

village home, whom of your family did you leave there? A. My family.

Q. Now, was your second son in the village when you left in 1933?

A. He was still in the village.

Q. His name was Tam Hin Soon?

A. Yes, Hin Soon.

Q. How old was he at the time you left in 1933?

A. 19.

Q. Your third son, one of the applicants here, Tam Chung Fay, how old was he when you left in 1933? [32] A. About nine.

Q. Did you see your third son from the time you left China in 1933 until he arrived in the United States this year?

A. The third son, did you say?

Q. Yes. A. Not after I left.

Q. Now, when Tam Chung Fay, your third son, arrived in the United States, did you recognize him? When Tam Chung Fay, one of the applicants, arrived here in Los Angeles this year, did you recognize him as anyone you had seen before?

A. Yes.

Q. Whom did you recognize him to be?

A. I recognized him to be my son.

Q. Which son? A. The third son.

Q. When you left China in 1933, how old was Tam Fay Hing? A. About 7.

Q. When the applicant in this case called Tam Fay Hing arrived in the United States this year,

(Testimony of Tam Dock Lung.)

did you recognize him as anyone you had seen before? A. I recognized him.

Q. Whom did you recognize him to be?

A. I recognized him to be my son. [33]

Q. Which son? A. The fourth son.

Q. I believe you stated when you left China in 1933, you left your son, the second son, third son, fourth son, fifth son, and the baby girl and your wife. After you left China in 1933, when did you next see your second son, Tam Hin Soon?

A. At the time Hin Soon came to the United States, C. R. 24, about the 10th month.

The Interpreter: C. R. 24, 10th month, that is 1935, and the tenth month would be from October 27, to the 31st, and November to the 25th.

Mr. Irwin: What is that, Chinese or English, please?

The Interpreter: The tenth month, he left from Hong Kong to come to the United States, C. R. 24. The tenth month covers October 27th to 31st, November 1 to November 25.

Mr. Irwin: What year?

The Interpreter: 1935.

Mr. Irwin: It is during that period he left Hong Kong.

Q. Did he arrive in the United States?

A. Yes.

Q. Where does he live today?

A. In Los Angeles.

Q. Is he in the building here? A. Yes.

Mr. Irwin: Your Honor, we have no picture.

(Testimony of Tam Dock Lung.)

May I ask the [34] bailiff to call to the door the gentleman I will designate as Tam Hin Soon?

The Court: Yes.

Q. (By Mr. Irwin): While we are waiting, how did your wife and children live when you were in the United States?

A. They lived together in the same house.

Mr. Irwin: May the record show a Chinese gentleman has come into the court room?

Q. Will you please tell us who this gentleman is?

A. This is my second son, Tam Hin Soon.

Mr. Irwin: Will you ask the gentleman to state his name?

The Interpreter: He says, "My name is Tam Hin Soon."

Mr. Irwin: May he be excused, your Honor?

The Court: You may return to the witness room.

Q. (By Mr. Irwin): Where did your wife and children get the money to live, money for food and so forth, when you were in the United States?

A. I sent home to them.

Q. Do you have with you at the present time any letters passing between your wife and yourself?

A. Not old letters, but some new letters.

Q. What happened to the old letters?

A. All burned.

Q. Where have you lived in the United States since you [35] came here in 1909? In how many places?

(Testimony of Tam Dock Lung.)

A. I have been moving about quite often. Sometimes several months.

Q. How many cities have you lived in?

A. I have lived in Chicago, Detroit, New York, North Carolina and Los Angeles.

Q. What kind of business have you been in since coming to the United States?

A. A cook for hotels and restaurants.

Q. Where do you now live?

A. I live at 639½ North Spring Street, Los Angeles, California.

Q. How long have you lived in Los Angeles?

A. Two or three years.

Q. How long have you lived in Southern California? A. Since I returned from China.

Q. The last time you returned from China was what year? A. C. R. 22-8-8.

The Interpreter: 1933, eighth month, eighth day, would be September 27th.

Mr. Irwin: I wanted to tie it up. Just the year is all I wanted. Your Honor, I believe Miss Martin and I previously stipulated that the American Consulate denied the application of the witness on the stand for a certificate to be issued for these two boys. [36]

Miss Martin: We will stipulate that the State Department has denied the two applicants or plaintiffs passports as American citizens on the ground that they are not American citizens.

Q. (By Mr. Irwin): Since being admitted to the United States in 1915 as an American citizen,

(Testimony of Tam Dock Lung.)

have you at all times maintained your citizenship? I guess that is not in issue, I will withdraw that.

Mr. Irwin: I think we should ask the bailiff to bring in the two boys. Is that customary?

The Court: Yes, you can bring them in for the purpose of identification.

Mr. Irwin: Please bring in Tam Chung Fay and Tam Fay Hing.

May the record show two Chinese gentlemen have come into the court room?

Q. I am going to ask the witness if he knows these two gentlemen.

A. Tam Chung Fay and Tam Fay Hing.

Q. Will you please indicate which is the third and which is the fourth?

A. This is the third one and this is the fourth one.

Mr. Irwin: May the record show that the witness has identified the taller of the two gentlemen as Tam Chung Fay and the shorter as Tam Fay Hing? [37]

Q. Directing your attention to the gentlemen you have identified as Tam Chung Fay, how old was he when you last saw him in China? A. Nine.

Q. And you did not seem him from the time you left China in 1933 until he arrived in the United States this year, is that right?

A. That's right.

Mr. Irwin: I think we have had his testimony previously that he recognized him as the same boy. That's all for those two boys. Thank you.

(Testimony of Tam Dock Lung.)

Q. On your trips returning to China when you left the United States, where did you first land when you got to China?

A. Straight to my village.

Q. At what port did you land?

A. Hong Kong.

Q. Then how did you go from Hong Kong to your village? A. By boat.

Q. When you leave your village, can you take a bus part of the way?

The Court: Leave the village for where?

The Witness: Walking.

Mr. Irwin: The point is well taken, your Honor.

The Witness: By walking.

Q. (By Mr. Irwin): When you leave your village, if you [38] want to go to Hong Kong, what is the first stop you make after you leave your village?

A. Straight to the wharf, where you take the boat.

Q. Does that boat first go on a river, or does it go directly on the ocean?

A. It is a small sea, a small water, before you go to the big sea.

Q. Do you stay on that first boat, or do you change to a bigger boat?

A. To Macao, you change.

Q. Change to what? A bigger boat or smaller boat?

A. From Macao you take a larger steamer.

Q. Where did you go from there?

A. To Hong Kong.

(Testimony of Tam Dock Lung.)

The Court: How long does it take you to go from your village to the first boat?

The Witness: About three or four li distance.

The Court: Do you want?

The Witness: To the small boat, I mean.

The Court: Three or four what?

The Witness: Li.

The Court: How long does it take you to walk?

The Witness: It is not very definite. Sometimes slow and sometimes fast.

The Court: Half a day? A day? [39]

The Witness: From half an hour to three-quarters of an hour should make it.

The Court: Then you take the boat to Macao. How long does it take you on the boat to Macao?

The Witness: If you left daytime in the village, you sleep overnight and get there either midnight or early in the morning.

Q. (By Mr. Irwin): Get where?

A. To Macao.

Q. That is where you transfer to a bigger boat?

A. From the little boat, you stay overnight, if you left in the daytime, and maybe the next morning or late midnight, you get to Macao.

The Court: How long does it take you to go by boat from Macao to Hong Kong?

The Witness: Three to four hours.

The Court: Then it takes longer to go from the place you get on the small boat to Macao than it does to go from Macao to Hong Kong?

The Witness: Yes, it takes longer. In a small

(Testimony of Tam Dock Lung.)

boat, you have to stay overnight before you can get to the approach of the larger steamer.

The Court: How many times have you taken this trip from Macao to Hong Kong and Macao from Hong Kong?

The Witness: Many times. I can't remember. [40]

The Court: Your best recollection is it only takes you three hours to go from Macao to Hong Kong or from Hong Kong to Macao?

The Witness: About three or four hours.

Mr. Irwin: I believe that is all at this time, your Honor, for this witness. Shall I call the next witness?

Miss Martin: Ordinarily, your Honor, we defer cross-examination, but I am not sure there will be much cross-examination of this witness, so if you allow me to put a couple of questions now, it may save recalling him.

The Court: I have no objection.

Mr. Irwin: I have no objection.

Miss Martin: Before I start, I want to ask the interpreter to translate into the English date C. R. 20-5-26.

The Interpreter: C. R. 20-5-26 is 1931, July 11th.

Miss Martin: July 11?

The Interpreter: That's right.

Miss Martin: Then let me ask the witness a question.

(Testimony of Tam Dock Lung.)

Cross-Examination

By Miss Martin:

Q. Do you speak English?

A. Not very much.

Q. You understand some English, don't you?

A. Little bit, yes. [41]

Q. Do you understand the English calendar days and months? A. Yes.

Q. You understand that this is the month of December in the English calendar? A. Yes.

Q. You understand that there are 12 months in the English calendar year? A. Yes.

Q. You testified a while ago that on your third trip to China you arrived in October, 1930.

A. I said the 8th month on the 20th day I left San Francisco.

Miss Martin: What is the 8th month and the 20th day?

The Interpreter: Of 1930?

Miss Martin: Just translate into English the Chinese date.

The Interpreter: He testified C. R. 19-8-20 and that is translated October 11, 1930.

Miss Martin: Will you please translate the Chinese date he just gave of 8-20?

The Interpreter: I have to know the year.

Miss Martin: All right. Ask him.

The Interpreter: I just have the month and the date.

(Testimony of Tam Dock Lung.)

The Court: What year were you referring to when you said [42] 8-20?

The Witness: C. R. 19.

The Interpreter: That would be 1930. If it is the eighth month, it would be October 11, 1930.

Q. (By Miss Martin): You understand that your testimony then is that you arrived in China on your third trip in October, 1930.

Mr. Irwin: He said he left.

The Court: The question was when you returned, and it was not when he arrived.

Miss Martin: Ask him when he arrived in China. I don't mean to ask him that. I am saying to the judge what I had in mind. I am starting all over now.

Q. Is it your testimony that you left the United States on your third trip to China C. R. 19-8-20, or that you arrived in China on that date?

A. I left the United States on that date.

Q. So that in your understanding of the English calendar, your testimony is that you left the United States in October, 1930. A. Yes.

Q. Do you know the date when you arrived in China on your third trip?

A. On the ninth month, 13th day, I arrived at the Village. [43]

The Court: Will you translate that?

The Interpreter: November 3, 1930.

The Court: Arrived at the village.

Q. (By Miss Martin): You testified that your

(Testimony of Tam Dock Lung.)

No. 4 son was born, according to the English calendar, in March of 1931.

Mr. Irwin: I don't so understand.

Q. (By Miss Martin): How can you believe that that is your own son?

The Court: Something is wrong somewhere.

Mr. Irwin: Yes, there is.

Miss Martin: Let's have the witness answer the question.

Mr. Irwin: I object to that as argumentative.

Miss Martin: Is there any objection to the question?

Mr. Irwin: Yes.

Miss Martin: What is wrong with the question?

Mr. Irwin: You have the wrong date.

The Court: My recollection is he didn't say that, or my notes don't show he said that.

Miss Martin: Mine do, your Honor.

Mr. Irwin: That is why I am objecting.

The Court: My notes say he said his fourth son was born on C.R. 26-2-2.

Miss Martin: I am talking about the No. 5 son.

The Court: No. 5? [44]

Miss Martin: That's right.

The Court: No. 5, March 14, 1931.

Miss Martin: That's right.

The Court: Excuse me. That is his testimony.

Miss Martin: Will the reporter read the question? I will rephrase the question if I said No. 4.

Q. You testified your No. 5 son was born in the

(Testimony of Tam Dock Lung.)

English calendar year, March, 1931. How could you believe he was your son?

A. C.R. 20-1-26 is the date.

Mr. Irwin: Pardon me, your Honor, before we have the answer.

I will object to that as argumentative, because I call the court's attention to the fact that the record which we have admitted in evidence shows that he left the United States, August 30, 1930, and while it is true he has given the date of his departure as October, counsel kindly stipulated.

The Court: He has not only given the date as October 11th, but also he testifies now he arrived in the village C.R. 9-13, which is November.

Mr. Irwin: May it please your Honor, the previous stipulation shows these documents were signed by him at the time and they are authentic records.

The Court: The stipulation was not that everything in [45] the documents was true. It is that he made the documents. The government didn't stipulate to the truth.

Mr. Irwin: But this is a typewritten signature, and the document was prepared at the office of Immigration. It shows he departed August 30, 1930. It is true he said he left in October.

The Court: We don't have any record here of when he departed. We have the record of when he came back.

Mr. Irwin: I believe Plaintiffs' Exhibit No. 4 shows that, your Honor.

The Court: Where is the date?

(Testimony of Tam Dock Lung.)

Mr. Irwin: Dated August 30, 1930.

Miss Martin: That doesn't indicate the date of departure. That is the date of the application for departure.

Mr. Irwin: Government counsel, with the assistance of the representative from the State Department, has the original immigration file, and Plaintiffs' Exhibit 4, which your Honor has in front of you, is a copy which bears the date, August 27, 1930, but stamped on it, over the witness' signature, government counsel says she will stipulate, it shows that he actually departed on the President Jefferson on September 12, 1930.

Miss Martin: So stipulated.

The Court: Departed on September 12, 1930?

Mr. Irwin: Yes. [46]

The Court: All right.

Miss Martin: Now may we have the question read and answered?

The Court: May I ask this witness a question?

Miss Martin: Well, your Honor, we haven't had an answer to my question yet. Counsel was objecting to a question which hasn't been propounded to the witness, and it is a proper question.

The Court: You were predicating your question upon——

Miss Martin: It is a good question, regardless of the date.

Mr. Irwin: It is misleading, in view of the stipulation he left September 12th.

(Testimony of Tam Dock Lung.)

The Court: Start over and rephrase your question now.

Q. (By Miss Martin): My question was, you testified that your No. 5 son was born, according to the English calendar, in March, 1931. How was it possible for him to be your son?

A. I arrived 9-13.

The Court: You arrived on 9-13?

The Witness: Yes.

The Interpreter: I was looking at the 1930 calendar here. There is an extra sixth month here on the top, so when I was reading the eighth, there is one month difference there.

Miss Martin: Have you translated some dates erroneously?

The Court: You mean to say you haven't translated correctly? [47]

The Interpreter: I translated according to the reading of it, but because there are two sixth months of that particular year——

Miss Martin: What has that to do with this?

Mr. Irwin: Will you let the interpreter explain, please?

Miss Martin: No, I will not, because that is one of the objections I have on the question of an interpreter. They attempt to straighten out some factual matters which we are attempting to get from the witness, and I submit what the interpreter is talking about has no bearing on the matter, and she should not be testifying unless she has erroneously translated a date.

(Testimony of Tam Dock Lung.)

The Court: He testified his fifth son was born C.R. 20-1-26. When did you leave the United States for China on this trip, according to the Chinese calendar?

The Witness: Chinese eighth month, 20th day.

The Court: What year?

The Witness: C.R. 19.

The Court: I thought a moment ago you said you arrived in China C.R. 9-13.

Miss Martin: That is true. He is now testifying that 19-8-20 is when he left the United States. He has testified to that about three times.

Mr. Irwin: I object unless counsel attempts to qualify as [48] an expert in Chinese. I am sure I don't know what he said.

Miss Martin: I object to that, too, because that is what the interpreter said.

The Court: If both of you will keep quiet a minute, I will be able to find out what I am trying to find out.

Miss Martin: So was I, your Honor, and I feel I am being balked at asking the witness a question for which I had properly laid a foundation.

The Court: Let me ask this witness another question.

When did you leave the United States, on the Chinese calendar, for China on the trip we are talking about? When did you leave the United States?

The Witness: C.R. 19, eighth month, 20th day.

The Court: I don't want the interpretation now.

(Testimony of Tam Dock Lung.)

When did you arrive in the village on the Chinese calendar?

The Witness: C.R. 19, ninth month, 12th day, I arrived Hong Kong. The 13th day, I arrived at the village.

Miss Martin: Do you have the English translation of that?

The Court: Just a minute. Give me the Chinese date of the birth of the fifth son.

The Witness: C.R. 20, first month, 26th day.

The Court: Now, if you want to translate, you can translate these dates.

Miss Martin: Will the interpreter again translate C.R. [49] 20-1-26.

The Interpreter: March 14, 1931.

Miss Martin: Now will you translate C.R. 19-9-13?

The Interpreter: It could be October 4 or November 3. The reason for it is that when you read the Chinese calendar by the numerical month, there are two sixth months in this year.

Miss Martin: It could be either October 4th or November 3rd, 1930?

The Interpreter: Yes.

The Court: Now do you want C.R. 19-8-20?

Miss Martin: We had that translated.

The Court: Yes, two or three times.

Miss Martin: That's right. Why should I want it any more?

The Interpreter: I might also say, there is nothing I am changing, but there are two sixth

(Testimony of Tam Dock Lung.)

months of the year. It could be September 20th or October 20th.

Miss Martin: What could be September 20th or October 20th?

The Interpreter: I mean it could be September 12th or October 11th.

Miss Martin: What could be?

The Interpreter: The eighth and the 20th.

Miss Martin: C.R. 19-8-20? [50]

The Interpreter: It could be these two dates on account of the last year. I was reading the other months. When you folks were disputing, I just checked myself.

The Court: I notice it is 12:00 o'clock.

Miss Martin: May I ask the one question I have wanted to ask all morning?

The Court: Yes. You want to know how or why?

Miss Martin: That's right.

Q. How can you believe it is your son?

Mr. Irwin: I object to that as argumentative.

The Court: Overruled.

Mr. Irwin: Will your Honor hear me on that matter? On the corrected date, if he got there in October, it could be his son.

The Court: I thought there was some question as to the interpretation. I was perfectly willing to give this son the benefit of the doubt on the interpretation, and that is why I insisted upon getting the Chinese. According to the testimony with the Chinese calendar, it is only four months and 13 days.

(Testimony of Tam Dock Lung.)

Mr. Irwin: I understand there is a nine-month spread from my expert.

Miss Martin: I move to strike that statement from the record.

The Court: The argument of counsel is not evidence. [51] Now, you ask the question.

Q. (By Miss Martin): If you arrived in China, according to the English calendar, in October, how can you believe that the No. 5 son was your son?

A. He was born a six months baby.

Q. Are there any identifying marks such as a scar or other birthmark by which you could identify either your No. 3 or No. 4 sons?

A. The third one has no. The fourth son has.

Q. What identifying mark does he have?

A. On the back, there is a boil.

Q. Did the No. 4 son have such a mark when you last saw him in China?

A. I asked the doctor to take care of that for him.

Miss Martin: Will you please ask the question again?

The Witness: I was the one that asked the doctor to take care of it.

The Court: I am sorry, but we will have to recess now.

Miss Martin: I have concluded.

The Court: We will now recess until 2:00 o'clock this afternoon.

(Thereupon, a recess was taken to 2:00 [52] p.m.)

December 23, 1952—2:00 o'Clock, P.M.

Miss Martin: I have two more questions of this witness.

The Court: All right.

TAM DOCK LUNG

the witness on the stand at the time of recess, having been previously duly sworn, resumed the stand and testified, through the interpreter, further as follows:

Cross-Examination
(Continued)

By Miss Martin:

Q. I show you Exhibit 5 in evidence, which is a photostatic copy of the original document, and ask you if that is your signature at the bottom.

A. That is my name.

Q. Did you furnish the information to the Immigration and Naturalization Service for the material contained in that document which you signed?

A. I do not know what is stated therein.

Q. At the time that that form was filled out, were you asked questions by the Immigration Service and did you give the answers there?

A. Yes, a few questions were asked.

Miss Martin: I ask the interpreter if she will translate for us the date of the No. 5 on the form, C.R. 20-5-26. [53]

The Interpreter: July 11, 1931.

Miss Martin: May I put that on the back of this exhibit?

(Testimony of Tam Dock Lung.)

The Court: Yes, surely.

Mr. Irwin: That was going to be my one question, anyhow.

Miss Martin: July 11, 1931. I show that to your Honor.

Mr. Irwin: I was going to bring that same thing out, your Honor. I want to ask one or two questions in connection with it.

The Court: All right.

Redirect Examination

By Mr. Irwin:

Q. At the time you returned from China in 1933, was your recollection of events transpiring in 1931—withdraw that.

When you returned from China in 1933, was your recollection fresher as to events transpiring in 1931, than it is today? A. Now.

Mr. Irwin: You can see I didn't talk to him, your Honor.

The Witness: I am quite an aged person and sometimes my memory fails me.

Q. (By Mr. Irwin): Let me ask this question. At the time you returned from China in 1933, did you truthfully answer the questions put to you by the officials of the Immigration [54] Service?

A. Yes.

Q. At the time you returned, did you give them the names and ages of your five children?

A. I was a little confused at that time, perhaps, because my oldest son was born in January, and really the fifth son should be third month, 26.

Mr. Irwin: Nothing further.

The Court: Is there any dispute or does this change the testimony in any way as to when he arrived in the village? He has testified two or three times he arrived at the village C.R. 19-9-13.

Mr. Irwin: That is some time in October, as I understand it.

The Court: October 4th to November 3rd.

Mr. Irwin: There is no dispute about that. The dispute, as I understand it—we will see if we can agree on this. This morning I understood him to say the boy was born C.R. 20-1-26.

Was that his oral testimony?

Miss Martin: Yes.

Mr. Irwin: But when he testified to that, I noted and I was waiting to ask him on redirect, when he returned in 1933, he said the boy was born C.R. 20-5, which the interpreter has translated for us as being July 11, 1931. [55]

The Court: Any other questions?

Mr. Irwin: I have none, your Honor, unless the Court has some.

The Court: I haven't any.

Mr. Irwin: Tell him he may step down, and would you please call the second son?

The Court: Do you object to his staying in the room?

Mr. Irwin: I have no reason to ask him to remain.

The Court: Maybe he'd better leave the room then.

TAM HIN SOON

called as a witness herein by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified, through the interpreter, as follows:

The Clerk: Will you please state your name?
The Witness: Tam Hin Soon.

Direct Examination

By Mr. Irwin:

Q. Where do you live, please?
A. You mean my present residence?
Q. Yes.
A. 727 East Ninth Place, Los Angeles, California.
Q. When did you come to the United States?
A. C.R. 24.
The Interpreter: 1935 or early 1936. [56]
Q. Before coming to the United States, where was your home?
A. Toy Shan, Hoy Yin, Don Hong New Village.
Q. Who was your mother?
A. My mother's name is Fung Shee.
Q. With whom did you live in the new village when you were a boy? A. My mother.
Q. Who else?
A. When I was born, I lived with my brother at that home.
Q. Do you remember the first time you saw your father? A. About 10 years old.
Q. What do you remember about the first time you met your father?

(Testimony of Tam Hin Soon.)

A. I don't remember exactly how I met him.

Q. Who introduced you to your father?

A. My mother stated it.

Q. Where did you first see him?

A. When I came home into my house, in the living room my mother told me, "This is your father."

Q. Before that time, had you known any other man as your father? A. No.

Q. After your mother told you, "This is your father," [57] did he stay at your home for a while?

A. We lived together at home.

Q. While he was at home, were there any new babies in your family? A. Yes.

Q. How many?

A. At the time when I was 10?

Q. Yes. A. Two.

Q. What were they, boys or girls?

A. Two boys.

Q. Did those baby boys live? A. Yes.

Q. Did they grow up in your house?

A. Together, we lived there, together we grew up there.

Q. After these two babies were born, did your father leave for a while?

A. He came back to the United States.

The Court: Before you go any further, let's get the names of the babies.

Mr. Irwin: Thank you, your Honor.

Q. What were the names of these two baby boys that were born about the time you were 10?

(Testimony of Tam Hin Soon.)

A. One is Tam Chung Fay and one is Tam Fay Hing. [58]

The Court: And when were they born?

Q. (By Mr. Irwin): Do you know the birth date of your brothers? A. I remember some.

Q. What do you remember about it?

A. As far as I remember, C.R. 14-8-17 for Chung Fay and C.R. 16-2-2 for Fay Hing.

Q. Do you remember the dates yourself, or is that something your mother told you?

A. My father told me.

The Court: When did he tell you?

The Witness: When I was in China.

Q. (By Mr. Irwin): When these two baby boys were born, you said your father went back to the United States. Did your father come back to China on another trip?

The Court: Let's get him out of China before he comes back.

Mr. Irwin: I thought we did.

The Court: No. He said his father left. Let's get the date.

Q. (By Mr. Irwin): Do you know the date your father left China to return to the United States after your two baby brothers were born?

A. C.R. 16, he returned to the United States.

Q. Do you remember anything about his returning to the [59] United States, about when he left? Was there anything in particular that makes you think he left and came back to the United States?

A. You mean what he said to me when he left?

(Testimony of Tam Hin Soon.)

Q. No. When the father left in 1927, the two babies were small. He was 12 years of age——

The Court: May I suggest that you don't testify?

Mr. Irwin: Very well, your Honor.

The Court: May I ask a question?

Mr. Irwin: By all means.

The Court: You said you were 10 years old when your father came back to China. How old were you when your father left for the United States?

The Witness: About 13.

The Court: Your father remained in China on this trip about three years?

The Witness: About three years.

The Court: How old was the youngest boy, that is, the No. 4 boy, how old was he when your father returned to the United States?

The Witness: Just a few months old.

The Court: You may proceed.

Q. (By Mr. Irwin): Did your father come back to China again? A. Yes. [60]

Q. How old were you when he returned to China this time? A. About 16.

Q. Where were you living at the time your father came back?

A. I was living with my mother and my brothers in the same house.

The Court: What was the date when your father returned to China at this time?

The Witness: About C.R. 19.

(Testimony of Tam Hin Soon.)

Miss Martin: Translate it, please.

The Interpreter: 1930 or early 1931.

Q. (By Mr. Irwin): You say you were about 16 at that time. Did your father stay in China or did he go back again to the United States? When he arrived there in 1930, how long did your father stay? A. About three years.

Q. During that time were there any children born? A. You mean the 19th year, that trip?

Q. The time he came back in 1930, during that period of time were there any children born?

A. Yes.

Q. How many? A. Two.

Q. What were they? [61]

A. One son and one daughter.

Q. Who was the first baby born, a boy or a girl?

A. The boy first.

Q. Do you know of your own knowledge the day the boy was born, or is it something that your father or mother told you as to the date of his birth? A. My father told me so.

The Court: When was your No. 5 brother born?

The Witness: According to my daddy's information to me, the third month, the 26th day, C.R. 20, third month, 26th day.

Mr. Irwin: When would that be in our calendar?

The Interpreter: May 13, 1931.

Q. (By Mr. Irwin): What was the name of the baby boy born at that time?

A. The boy's name is Tam Jing Hing.

The Court: Now, you say that you were about

(Testimony of Tam Hin Soon.)

19 when your father returned to China. How long after your father returned to China was the No. 5 boy born?

The Interpreter: I am giving him the English and he is trying to give Chinese dates.

Mr. Irwin: The Court is asking the question.

The Court: Can't you interpret the question? He doesn't need to have any English or Chinese dates. I am asking him how many months it was from the time the father arrived in the village until this boy was born? [62]

The Witness: I don't remember how many months exactly.

The Court: You were 19. Don't you remember the birth of your brother?

The Witness: Several months after my father returned.

The Court: Several months. Was it three, six, nine, twelve?

The Witness: About half a year or so.

The Court: Was there anything peculiar about this birth?

The Witness: I was told that the baby was very weak when he was born.

The Court: Was there anything peculiar about the No. 5 boy when he was born?

The Witness: No.

Mr. Irwin: Your Honor understands that this fifth boy is not one of the applicants.

The Court: He is not an applicant?

(Testimony of Tam Hin Soon.)

Mr. Irwin: No. It is an entirely collateral matter.

The Court: The applicants are the third and fourth boys?

Mr. Irwin: Yes, and we have no trouble on those dates.

The Court: Don't you have any personal recollection of when the No. 5 boy was born?

The Witness: I was told that the baby was very weak and constantly ill.

The Court: That surprises me. In these cases some of [63] the witnesses will remember very distinctly things that happened when they were eight or ten, and now this boy was 16 or 19 and he doesn't remember.

Mr. Irwin: With all deference to the court, I am a little doubtful about boys of six and seven giving you dates.

The Court: But when I deny an application, then you feel an injustice has been done.

Mr. Irwin: If I may submit, his statement there has a ring of sincerity. He was very weak and sick all the time, which goes to show he was a premature baby. The father said it was a six-months baby.

The Court: You can proceed.

Q. (By Mr. Irwin): You say this was in 1930. After the baby girl was born, was she the youngest one in the family?

A. Yes. The youngest one is the little girl, the sister.

Q. I better go back a moment to this fifth boy.

(Testimony of Tam Hin Soon.)

You were 19 when your father came back to China in 1930, is that your testimony?

A. The year when he went back to China, I was only 16.

Q. How old were you when he left in 1933?

A. 19.

Q. Do you remember when the fifth son was born? Do you remember anything about it right now? [64]

A. He was weak and they called a doctor.

Q. What I want to know is where were you when the baby was born? A. I was in China.

Q. Were you home when the fifth son was born?

A. I think I was at school.

Q. And where did you go to school?

A. I was studying at a school in the old village.

Q. How far was that from your new village where your home was?

A. 10 to 20 jongs. Not too far.

The Interpreter: 10 feet to a jong.

Q. (By Mr. Irwin): How many minutes did it take you to go from your house to school?

A. About two leters.

The Interpreter: That means in English about 10 minutes.

Q. (By Mr. Irwin): Do you remember when your father left for the United States, when your little sister was a baby?

A. After my youngest sister was born, my father came back to the United States.

Q. When your father left at that time, the last

(Testimony of Tam Hin Soon.)

time, for the United States, who was living at home?

A. My mother, Fung Shee—you mean the time when my father left for the United States the last time?

Q. The last time, yes. [65]

A. My mother, Fung Shee, Jing Hing, Chung Fay, Fay Hing, my sister and myself.

Q. At the time your father left for the United States the last time, how old was Tam Chung Fay?

A. About nine.

Q. How old was Tam Fay Hing?

A. About seven.

The Court: When did your father leave for the United States the last time, what date?

The Witness: C.R. 22, about the eighth month.

The Interpreter: 1933. The eighth month would be September or October.

Q. (By Mr. Irwin): When your father left in 1927 when the third boy and fourth boy were little boys, was there any other man living at your house from that time until the time your father came back in 1930? A. No.

Q. You came to the United States when?

A. C.R. 24.

The Interpreter: 1935 or early 1936. It is 1935.

Q. (By Mr. Irwin): How did you travel from your village to the United States?

A. I walked to the wharf and took the boat.

Q. Is there any name for this place where the wharf is? [66] A. Wan Dew.

(Testimony of Tam Hin Soon.)

Q. That is where the wharf is?

A. That is where the tender brings you to the steamer, but it is not a regular wharf, not a modern wharf.

Q. At the time you left China, did you see the third brother or the fourth brother until they came to the United States? A. Yes.

Q. Where? A. At my home.

Q. I don't think you understand. After you left China, did you ever see your third or fourth brothers again until they came to the United States?

A. Yes. I haven't seen them.

Q. Do I understand that you lived all the time from the time you were a small boy until you left to come to the United States, at home?

A. Yes.

Q. At the time you left, you had known Tam Chung Fay since he was a baby?

A. Yes, from childhood.

Q. He was raised in the house with you?

A. Same house.

Q. And was the same thing true as to Tam Fay Hing?

A. Grew up together. We lived in the same home together [67]

Q. As the older brother, did you have anything to do with them as they were growing up?

A. I am older than they are and they are part of my family and my younger brothers.

Q. I show the witness—I believe this is for identification, but I will offer it in a moment—

(Testimony of Tam Hin Soon.)

Plaintiffs' Exhibit 6 for identification, and ask if you can tell me who those people are there.

A. In the middle sitting is my mother, Fung Shee. Chung Fay is right behind her.

Q. Is that a brother of yours?

A. Yes, my brother.

Q. Which one?

A. The third brother. On the right side as I am sitting now is Fay Hing, my other brother.

Q. The young girl in the picture, have you ever seen her? A. When I was in China.

Q. Someone told you who that girl is?

A. Yes. My brothers now told me this is our sister. Tam Mow Don is the name.

Q. The lady you point out as your mother, does she look the way she did when you left China in 1935? A. Much older than she was. [68]

Q. The picture is much older than she was?

A. Yes.

Q. The two boys you have identified as your brothers, are they older in the picture than they were when you left them in China?

A. They are older now.

Q. But are you able to recognize, not from what someone else told you, those two young men in the picture as the two boys you knew as your brothers when you left in 1935?

A. When I look at the picture, the face and the expression is the same as when they were young.

Q. How old was No. 3 brother when you came to the United States? A. About 11.

(Testimony of Tam Hin Soon.)

Q. And No. 4 brother? A. About 9.

Mr. Irwin: May I offer Plaintiffs' Exhibit 6 for identification, your Honor, at this time?

The Court: It may be received.

The Clerk: Exhibit 6 in evidence.

(The photograph referred to was received in evidence as Plaintiffs' Exhibit No. 6.)

Mr. Irwin: May I ask if the bailiff will bring the two applicants in for identification purposes?

The Court: All right. Will you bring them [69] in?

Q. (By Mr. Irwin): While we are waiting, I might ask this question. There was a No. 1 brother, wasn't there? A. Yes. He is dead.

Q. Where did he die, do you know?

A. Shanghai.

Q. This No. 5 brother we have been having the trouble about, where is he, if you know?

A. Studying in Canton, China.

Mr. Irwin: Let the record show two Chinese gentlemen have entered the room. I will now ask the witness about them.

Q. Do you know the two gentlemen that just came in the room?

A. Chung Fay, my third brother, and my No. 4 brother, Fay Hing, over there.

Q. Are they the men that you knew as boys who lived in your home with you up until the time you left for the United States? A. Yes.

Q. You knew them since they were babies?

(Testimony of Tam Hin Soon.)

A. From the time of their birth until we grew up, we were together in the same home.

Q. With the same mother?

A. The same mother.

Q. And the same father, as far as you know?

A. Yes, all the same together. [70]

The Court: Now, will the witness get over there and stand between the two boys?

Mr. Irwin: Yes, certainly. Ask him to step down. Your Honor, you might look at the photograph, too, because there is a distinct difference between the mother and the alleged father here.

The Court: All right.

Mr. Irwin: The younger boys can go out now. I wonder, though, if we could call them back with the father and have the four of them stand there with the picture.

The Court: Yes.

Mr. Irwin: I will do the running out for them and save the bailiff the time.

Will you ask the witness to step down, and then your Honor can look at them all together, the four of them.

(Witness complying.)

Mr. Irwin: I have no further questions.

Miss Martin: I would like to defer cross-examination.

The Court: All right. Which one do you want next?

Mr. Irwin: No. 3 next, your Honor. [71]

TAM CHUNG FAY

called as a witness by and on behalf of the plaintiffs herein, having been first duly sworn, was examined and testified, through the interpreter, as follows:

The Clerk: Will you please state your name?

The Witness: Tam Chung Fay.

Direct Examination

By Mr. Irwin:

Q. Where did you live in China before coming to the United States?

A. I was living at Don Hong New Village.

Q. With whom did you live?

A. With my mother, my third, my fourth—I mean the third, the fourth, the fifth brother, and a younger sister and my mother.

Q. Did you have a No. 2 brother?

A. Before he came to the United States, he was living with us, also.

Q. Do you remember when your No. 2 brother left for the United States? A. About C.R. 24.

Q. Do you remember anything about his leaving?

Miss Martin: Pardon me. What is the translation of the date? [72]

Mr. Irwin: Excuse me.

The Interpreter: 1935 or early 1936.

Q. (By Mr. Irwin): Do they do anything when a member of the family leaves? Is there anything about the No. 2 brother leaving that you remember?

A. My mother went and bought some pork and we ate a dinner together.

(Testimony of Tam Chung Fay.)

Q. How old were you when you first met the man you believe to be your father?

A. After I was born.

Q. Do you know when you were born? You have not been told when you were born, or have you? A. My mother told me.

Q. What did your mother tell you?

A. My mother told me I was born C. R. 14, eighth month, 17th day.

The Interpreter: October 4, 1925.

Q. (By Mr. Irwin): How old were you when you first remember seeing your father?

A. When I was born, my father was home and then naturally I see my father.

The Court: Do you remember seeing your father when you were a little baby?

The Witness: The third time when he returned to the village home. [73]

Q. (By Mr. Irwin): When was that?

A. I think it was C. R. 19.

The Court: How old were you then?

The Witness: About six.

Q. (By Mr. Irwin): What do you remember about your father coming home?

A. Not very clearly.

Q. Do you remember your father leaving again to come to the United States?

A. I knew that he was coming back to the United States.

Q. Did he go? Did he leave? A. Yes.

The Court: How old were you when he left?

(Testimony of Tam Chung Fay.)

The Witness: Nine.

Q. (By Mr. Irwin): Did you ever see your father from that time until you came to the United States? A. Yes.

Q. Where? A. At the airport, to meet me.

Q. Do you mean the airport where you landed in the United States? A. Yes.

Q. Had you seen him between the time he left when you were nine and the time you arrived at the airport here? A. No. [74]

Q. Did you have any younger brothers or sisters? Pardon me. How old is your No. 4 brother?

A. 26.

Q. How much younger is he than you?

A. Two years.

Q. Do you have any brothers and sisters younger than your No. 4 brother?

A. No. 5 brother, Jing Hing, and one more younger sister, Tam Mow Don.

Q. How old is your No. 5 brother?

A. About 22 now.

Q. How old are you? A. I am 28.

The Court: You say you are 28. Your No. 4 is 26 and No. 5 is 22. Is that right?

The Witness: Yes.

Q. (By Mr. Irwin): When you left China, who was still at home with your mother?

A. My fifth brother and youngest sister.

Q. Do you know where your fifth brother is now?

A. Studying in Canton, China.

(Testimony of Tam Chung Fay.)

Mr. Irwin: May I have the photograph again, please, your Honor?

Q. Will you please show the witness Plaintiff's Exhibit 6 and ask him to tell us who the people are in that picture. [75]

A. The central one sitting is my mother. The one standing behind her is I. On my left standing is the fourth brother, and the one on my right standing is Tam Mow Don, younger sister.

The Court: Well, it's 3:00 o'clock now. We will take a recess until 10 minutes after 3:00.

(Recess.)

Q. (By Mr. Irwin): At the time you left China to come to the United States, how did you go from your home to Hong Kong?

A. From the village, I walked to Won Dew, the waterfront there.

Q. Did anybody go with you from the village?

A. My fourth brother, Fay Hing, and myself.

Q. Walked to the waterfront? A. Yes.

Q. What did you do when you got to the waterfront?

A. From the village, we walked to this waterfront, Wan Dew, and there we have a small wooden boat that takes us out to the sea, a little boat, and then we got on the bigger steamer.

Q. Did you both get on the boat at the waterfront? A. Together.

Q. Did you both go on this boat to the bigger boat? A. Together. [76]

(Testimony of Tam Chung Fay.)

Q. When you got to Hong Kong, where did you go?

The Court: Let's get him over to Hong Kong first.

Mr. Irwin: All right.

The Court: When you got on the boat, where did you go first?

The Witness: From Kong Moon to Macao and Macao to Hong Kong.

The Court: How long did it take you to go over to Macao?

The Witness: We left the first month, the 15th day in the afternoon, from the village, and arrived in Hong Kong the 17th day in the early morning, before noon.

The Court: Let's go back. How long did it take you to go in this small boat to Macao?

The Witness: About half an hour from the little tender to the big ship.

The Court: In the big ship to Macao, how long did it take?

The Witness: Well, through the night.

The Court: What time of the day did you arrive at Macao?

The Witness: Afternoon.

The Court: Then you were on the boat all through the night and landed the next afternoon, is that correct?

The Witness: From the village, we left and we took the little boat to the dock to get on the big

(Testimony of Tam Chung Fay.)

ship, and from the [77] big ship about seven or eight hours.

The Court: Were you on the big boat seven or eight hours before you got to Macao?

The Witness: That's right.

The Court: How long did it take you to go from Macao to Hong Kong?

The Witness: Three or four hours.

The Court: Three or four hours. What time did you leave Macao?

The Witness: We arrived at the big boat at night and that sail at dark, in the evening.

The Court: What time did you get to Hong Kong?

The Witness: The movement of the ship is about three or four hours, but we spent so many hours on the boat to get there, to Hong Kong.

The Court: You left Macao at dark. What time did you get at Macao? Did you get to Macao before midnight or the next morning after daylight?

The Witness: It is night time.

The Court: Do you know what time it was when you arrived at Hong Kong?

The Witness: Early in the morning.

The Court: All right.

Mr. Irwin: Let me go back over it a little bit now.

Q. You left your home in the new village what time of [78] the day?

A. About 2:00 p.m. in the afternoon.

Q. When you got to the wharf, how long did

(Testimony of Tam Chung Fay.)

you have to wait for the little boat to take you out to the bigger boat?

A. About three something when we get to the big boat.

Q. When you got to the big boat at the wharf, how long were you there before the big boat started out for Macao?

A. The moment we got on, left the small boat to the big boat, we sailed.

Q. For Macao?

A. To Kong Moon first. From Kong Moon to Macao.

Q. Is Kong Moon the same place as the wharf?

The Interpreter: It is a little town.

Mr. Irwin: Ask him, if you will, please.

The Witness: Kong Moon is the name of a place.

Q. (By Mr. Irwin): Is it a place where the boat started from to go to Macao or is it a place it stopped on the way to Macao?

A. It is a place you pass before you go to Macao.

Q. From the time the boat started to the wharf to go to Macao, how many hours was the boat moving to get to Macao?

The Interpreter: The big boat?

Q. (By Mr. Irwin): The tender takes them to the big boat and the big boat takes them to Macao and they change to another boat that took them to Macao, is that right? [79]

A. That's right, three boats.

Q. We get him from the tender to the first boat.

(Testimony of Tam Chung Fay.)

When did that boat start? He said it started about 3:20 in the afternoon. How long did it take to get to Macao?

A. To Macao, seven, eight hours.

Q. Then when they got to Macao it was night, was it? A. Yes.

Q. Did you stay on that boat the rest of the night, or did you get right off of it in the middle of the night?

A. We transferred to the third ship.

Q. How long did you stay on the big ship before the sailing for Hong Kong? A. Until night.

Q. What? A. Until evening.

Q. Then you left the wharf 3:20 in the afternoon?

A. At 3:00 something, I was on the second boat.

Q. And did it leave at 3:00 something for Macao?

A. Yes. It sailed after we arrived there.

Q. Do I understand they were sailing about seven hours before they got to Macao?

A. Near morning before we got to Kong Moon.

Q. Did it stop on the way?

A. Not until we got to Kong Moon.

Q. Where is Kong Moon? Is that on the way to Macao? [80] A. Yes, on its way.

The Court: To go to Kong Moon, you go there after you leave Macao?

The Witness: No, on the way.

Mr. Irwin: If your Honor will indulge me, this is what I have been advised. Before the war, the

(Testimony of Tam Chung Fay.)

old gentleman's last trip was 1933, the boats used to sail from the wharf directly across the ocean to Macao. Since the war, there is a smaller boat. It goes closer to the shore. It goes up and stops at Kong Moon, and then goes on to Macao. In other words, it travels a different route than it did when the father last made the trip.

Miss Martin: Who advised you of that?

Mr. Irwin: This gentleman here, who has been to Hong Kong. He doesn't speak English.

The Court: Have they changed the route to Hong Kong from Macao?

Mr. Irwin: No, that is the same. He gives three or four hours, which is the same as the father testified.

Miss Martin: I have no knowledge about any of this, but if we have a witness who can tell us what the facts are——

Mr. Irwin: He has testified to the sailing time.

Miss Martin: I don't stipulate to Mr. Irwin's statement.

The Court: Suppose we go ahead.

Mr. Irwin: Let's try again. [81]

Q. Let's sail from the wharf and have him tell us exactly what the boat did when it left the wharf. We already know we took a tender out to the boat. They are on this boat taking off for Macao. Where did the boat go? How long did it take? Where did it stop? Tell us everything.

A. From Wan Dew wharf, we took off at about 3:00 in the afternoon. We take the steamer to Kong

(Testimony of Tam Chung Fay.)

Moon. We arrive there the next early morning. There we took another ship and we arrive at Macao by dark.

The Court: Then you took three big boats?

The Witness: All the way to Hong Kong, we took three steamers and one little tender.

Q. (By Mr. Irwin): From the wharf, where was the first stop where they changed boats?

A. It is Wan Dew, about 3:00 o'clock there, we took a steamer to Kong Moon.

Q. What time did you get to Kong Moon?

A. There we took another ship to Macao.

Q. How long did they wait at Kong Moon before the other ship took off for Macao?

A. Right after we arrived there, we transferred to the other boat.

Q. Did it sail right away?

A. Yes, it sailed.

Q. When did it get to Macao? [82]

A. In the evening.

Q. They transferred then to another boat?

A. Transferred to a larger steamer from there.

Q. Let's stop right there. They transferred to the larger steamer. Did they sail right away or did it wait a while?

A. Waiting. We had some waiting. Waited to dark before sailing.

Q. How long was this steamer moving before you got to Hong Kong?

A. Three or four hours.

Q. Who was with you?

(Testimony of Tam Chung Fay.)

A. Myself and my fourth brother.

Q. When you got to Hong Kong, where did you go? A. A hotel called Eastern.

Q. Did you stay at that hotel all the time you were in Hong Kong?

A. I didn't stay there continuously.

Q. Where else did you stay?

A. Shum Sui Po, 30 San Ning Road.

Q. Is that a camp or a hotel or what?

A. It is a building.

Q. Is that the street that had the hotel?

A. It is another place. [83]

Q. Did you stay there then until you left?

A. It was like this. First we went to the Eastern Hotel or Dung Fong Hotel. Then the second move was to Shum Sui Po where the wooden houses were.

The Court: The what?

The Witness: Wooden houses.

The Interpreter: I think it is a camp.

The Witness: Number three was to No. 30 San Ning Road in the area of Shum Sui Po. [84]

Q. (By Mr. Irwin): When they moved from the hotel to where the wooden houses were, did they still go back to the hotel to get their mail?

A. One time we went back to the hotel to get our mail, and later on, when we moved to 30 San Ning Road, we went to a store to get our mail; Lum Hing Sing, another store where we got our mail.

Q. You have come through that door two or

(Testimony of Tam Chung Fay.)

three times today with another man shorter than you. Who is that man?

A. My fourth brother, Tam Fay Hing.

Q. By the way, did you and your brother go to school in China? A. Yes.

Q. Did you go to the same school?

A. Same school.

Q. Were you in different classes?

A. Not the first year I went to school but the latter years we were in the same class.

Mr. Irwin: Nothing further.

Miss Martin: I will defer cross-examination.

(Witness withdrawn.)

The Court: Call the other brother. [85]

TAM FAY HING

called as a witness by and on behalf of the plaintiffs herein, having been first duly sworn, was examined and testified, through the interpreter, as follows:

The Clerk: State your name, please.

The Witness: Tam Fay Hing.

Direct Examination

By Mr. Irwin:

Q. Where did you live before you came to the United States?

A. I was living at Toy Shan, Hay Yin, Don Hong Village.

Q. With whom were you living?

(Testimony of Tam Fay Hing.)

A. Mother, my second brother, my third brother, my first brother, my younger sister.

Q. Did your second brother leave China before you did? A. He came sooner.

Q. Do you remember when your second brother left China? A. About C.R. 24.

The Interpreter: 1935 or early 1936.

Q. (By Mr. Irwin): When were you born, if you know? A. I was born C.R. 16-2-2.

Miss Martin: Stipulate that is March 5, [86] 1927.

Mr. Irwin: I think it might be helpful if we trace the route now and then tomorrow morning I would like to go back a little way. Your Honor has shown interest in this course of travel and it is a little out of order, but I would like to take the route right now.

The Court: I would like to finish the direct examination tonight.

Q. (By Mr. Irwin): Did the man whom you knew as your father live with you any of the time you were in China? A. Yes.

Q. How long did he live with you?

A. Three or four years.

Q. Do you remember when he left China?

A. About C.R. 22.

The Interpreter: 1933 or early 1934.

The Court: How old were you when your father left China?

The Witness: Six or seven years old.

Q. (By Mr. Irwin): Did you ever see your

(Testimony of Tam Fay Hing.)

father after he left China in 1933 or early 1934 until you came to the United States?

A. I saw him here after my arrival.

Q. That was the first time you saw him after he left when you were six or seven years of age?

A. That is the fact.

Q. Did you go to school in China? [87]

A. Yes.

Q. Where was the school?

A. In the old village, Don Hong Old Village.

Q. And you lived where?

A. We lived at Don Hong New Village.

Q. How far was it from your home to your school? A. About 20 jongs.

Q. About how much in time?

A. It depends on how fast you walk. It takes about 10 minutes or 10 to 15 minutes. There is no set time it takes to get there.

Q. I show you Plaintiffs' Exhibit 6 in evidence and will you identify the people there?

A. The middle sitting is my mother Fung Shee. On the right facing me as I look at it is myself. The middle one behind my mother is Tam Chung Fay, my third brother. The left side is my younger sister, Tam Mow Don.

Q. How much older are you than your younger sister?

A. She is 21 this year. About five years.

Q. Do you know when she was born?

A. C.R. 21.

The Interpreter: 1932 or early 1933.

(Testimony of Tam Fay Hing.)

Q. (By Mr. Irwin): Do you remember the event itself, the fact of a baby girl being born? Were you old enough to remember? [88]

A. Yes, I kind of remember.

Q. The girl that you have pointed out in Exhibit No. 6, how far back do you remember her?

A. From the time of her birth until now, I know her.

Q. Did she always live in your home from the time you can remember?

A. Yes. We lived in the same home.

Q. By the way, since you are in the picture, where was the picture taken?

A. In Hong Kong.

The Court: When?

Mr. Irwin: I was going to put it with reference to the departure, your Honor.

Q. How long before you left Hong Kong for the United States was that picture taken?

A. At the time when my mother came up to Hong Kong, we took it. I can't remember the date.

Q. Had you ever been to Hong Kong more than once? A. Never.

Q. How long were you in Hong Kong from the time you arrived until you left for the United States?

A. Over two years. You mean leaving in Hong Kong?

Q. That's right. A. Over two years.

Q. Do you remember when you left your village to go to [89] Hong Kong?

(Testimony of Tam Fay Hing.)

A. Yes, I remember some.

Q. What time of the day did you leave your village and where did you go? How did you go to Hong Kong?

A. C.R. 39, the first month, 15th day, I left the village to go to Hong Kong. On the 17th day, I arrived there.

Q. Was that a two-day span?

The Interpreter: Two days' time.

Q. (By Mr. Irwin): What time of the day did you leave your village?

A. About 2:00 p.m., we left the village.

Q. Did you ride or walk to where you took the boat?

A. I walked to the place where I took the boat.

Q. Who was with you?

A. My third brother was with me.

Q. When you got to the place you took the boat, what did you do? When you got to the place where you take the boat, where did you first go on the boat?

A. Took a little boat to the big ship, and then to Kong Moon, and then to Macao, and then Hong Kong.

Q. At the time you took the little boat after the first big ship, did the first big ship leave right away?

A. Not very much longer, the boat was sailing.

Q. You first went where, did you say?

A. Kong Moon. [90]

Q. What did the boat do when it got to Kong

(Testimony of Tam Fay Hing.)

Moon? A. We transferred to another boat.

Q. Where did it go? A. To Macao.

Q. From the time you left the wharf in the afternoon, what time was it you got to Macao?

A. Two days, two nights. About, according to my figuring, two nights and two days.

Q. You first told us it took two days to get to Hong Kong.

A. It is two from the time from the village.

Q. That isn't what I want to know. From the time you got on the boat at the wharf, when the little boat takes you to the first big boat, how long did it take the first big boat to get to Macao?

A. About seven or eight hours, approximately seven or eight hours.

Q. That is to Macao? A. Yes.

Q. Now, did the boat, when it got to Macao, how long did they stay there before they left for Hong Kong?

A. Some time midnight, night time, before we left.

The Court: Before we leave this, what time of the day was it you arrived at Macao?

The Witness: In the morning, forenoon. [91]

The Court: You left the village at 2:00 o'clock in the afternoon the day before and you arrived at Macao the next morning, is that right?

The Witness: Yes. The next morning we arrived at Kong Moon.

Mr. Irwin: I thought we were at Macao.

The Court: Will you listen to my question and

(Testimony of Tam Fay Hing.)

try to ask him just this question. You left the village at 2:00 o'clock in the afternoon. What time the next morning did you arrive at Macao?

The Witness: Over 10 hours.

The Court: You left at 2:00 o'clock in the afternoon. You mean to say you arrived at Macao 10 hours later?

The Witness: I am speaking of arriving at Kong Moon.

The Court: I am asking you about Macao. Do you know where Macao is?

The Witness: About 20, I presume a day and a half.

The Court: What time of the day did you arrive at Macao?

The Witness: About noon time.

The Court: A little while ago you said it was forenoon.

The Witness: I think it is more noon time.

The Court: It was not in the afternoon?

The Witness: I really don't remember very clearly whether it is the forenoon or noon time. [92]

Mr. Irwin: I think I can perhaps ask him this.

Q. Had you ever made this trip before?

A. I have never been there before.

The Court: I understood he only made the one trip.

Mr. Irwin: Maybe these names are throwing him.

The Court: All right.

Q. (By Mr. Irwin): You walked from your

(Testimony of Tam Fay Hing.)

village to the wharf, is that correct? A. Yes.

Q. Took a little boat to a bigger boat. To a bigger boat out from where the wharf was, is that right? A. Yes.

Q. That boat sailed? A. Yes.

Q. How many hours did it sail before it stopped the first time? A. I don't understand.

Q. The boat started. This is the first big boat. It starts. You and your brother are on the boat.

A. Yes.

Q. When did you get off of that boat?

A. Not very long.

Q. What did you do when you got there?

The Court: What do you mean by "there"?

Q. (By Mr. Irwin): Do you know the name of the place the [93] first boat stopped at?

A. Kong Moon.

Q. How long did it take you to get to Kong Moon from the time you left the wharf?

A. I can't tell you how many hours it took.

Q. Did you go to sleep?

A. Overnight I was on the boat.

Q. So that from the wharf to Kong Moon was overnight? A. Yes.

Q. Was the sun up high when you go to Kong Moon or was it just coming up?

A. About 7:00 or 8:00 o'clock in the morning. You mean to Kong Moon?

Q. Yes. Would that be the first stop the boat made? A. Right.

(Testimony of Tam Fay Hing.)

Q. That is 7:00 or 8:00 o'clock the next morning, is that right?

A. Yes, about 7:00 or 8:00 o'clock. I am not too sure.

Q. How did you go on to Macao? On the same boat or another boat?

A. We changed to another ship to go to Macao.

Q. Did you have to wait a while for that ship to leave for Macao or did it leave right away?

A. There was a little waiting there.

Q. About what time of the day did you leave Kong Moon? [94]

A. The ship sail after we got transferred to the boat. It was evening time.

Q. They arrived at 7:00 or 8:00 in the morning and a short time later, evening time, they left for Macao?

A. I am not sure. I think it is 7:00 or 8:00, or 8:00 or 9:00 o'clock, I arrive at Kong Moon, and we got on another steamer and head to Macao.

Q. What time of the day or night did you get to Macao? A. Early in the morning.

Q. What did you do when you got to Macao about going to Hong Kong?

A. We transferred to another steamer to go to Hong Kong.

Q. When did they get there?

A. I arrived C.R. 39, the first month and the 17th day at Hong Kong.

Q. What the judge wants to know is how long did it take the boat to go from Macao to Hong

(Testimony of Tam Fay Hing.)

Kong? A. Three or four hours.

The Court: What time did you arrive at Hong Kong?

The Witness: I don't know the exact hour, but it was in the morning. It was in the forenoon some time.

Q. (By Mr. Irwin): Let's see if I have got the testimony now. From the wharf to Kong Moon, you left about 3:00 o'clock in the afternoon, is that right? [95] A. Yes.

Q. You got to Kong Moon 7:00 or 8:00 o'clock the next morning? A. Yes.

Q. You transferred to another boat at Kong Moon. A. Yes.

Q. You waited a little while and then the boat left for Macao, is that right? A. Yes.

Q. When did the boat get to Macao?

A. Evening.

Q. Then how long did you wait in Macao before the boat sailed for Hong Kong?

A. About midnight, some time around midnight.

Q. When it left? A. Yes.

Q. Do I understand you arrived at Hong Kong in the early morning? A. Yes.

The Court: He said before he arrived in the morning. Now you say early morning. Do you know what time it was you arrived in Hong Kong?

The Witness: I don't remember the hour, but I know it was in the morning some time.

The Court: Was it daylight? [96]

The Witness: Yes.

(Testimony of Tam Fay Hing.)

The Court: Was the sun up?

The Witness: That I don't remember.

Miss Martin: Now, may we ask the witness at this point how many hours it took?

The Court: He has testified three or four hours from Macao to Hong Kong.

Mr. Irwin: They have all said that.

The Court: He testified three or four hours.

Mr. Irwin: What time of the year was this, please? What was the day? What would that be in our calendar?

Miss Martin: I don't recall this witness stating that, your Honor.

The Court: I have got it down here.

Miss Martin: This very witness in hours from Macao to Hong Kong?

Mr. Irwin: I have written it down.

Miss Martin: All right.

Mr. Irwin: Can you give us the date on the calendar when he arrived at Hong Kong?

The Interpreter: Yes. Just a moment. About March 5, 1950.

The Court: Was this the first time you were on a big boat like this?

The Witness: My first trip. [97]

Mr. Irwin: Would your Honor permit me to ask the witness to draw his itinerary as best he can from the village to the wharf, to the dock?

The Court: If he can draw it.

Mr. Irwin: Ask him if he can start from his

(Testimony of Tam Fay Hing.)

village and show us the route and the stops, where they changed the boats, and everything.

The Witness: I don't know how to sketch.

Mr. Irwin: That answers that.

The Court: I notice it is 15 minutes after 4:00. Are you going to finish with this witness?

Mr. Irwin. Well, your Honor, I have done the best I can. I think I have. Might I go over my notes?

The Court: Well, maybe we'd better take a recess, and if you want to, you can call him back in the morning.

Mr. Irwin: Yes, your Honor. I want to see if finally I have got it all in.

The Court: We will stand in recess until 10:00 o'clock in the morning.

Mr. Irwin: I have one other witness, a man who made this trip before the war and since the war.

The Court: I would like to have somebody who can tell about this, because the testimony we have had before is it is an overnight trip from Macao to Hong Kong. These witnesses say it is three or four hours. Other witnesses testified they [98] have been on the boat overnight. Of course, that is the evidence in this case.

We will stand in recess until 10:00 o'clock tomorrow morning.

(Thereupon, a recess was taken to 10:00 a.m., Wednesday, December 24, 1952.) [99]

December 24, 1952, 10:00 A.M.

The Court: You may proceed.

Mr. Irwin: Your Honor, may I make a brief statement to the court? I always recognize first the responsibility of my duty to the court. I was having great difficulty with this witness yesterday and I wanted the court to know I had not talked to the witness last night through an interpreter or otherwise. Your Honor realizes the handicaps, the difficulties where the locale is different, and in this instance we have to take what is given through the interpreter.

The Court: Just think what the problem is to the court.

Mr. Irwin: I sympathize with the court. I want to say the questions I am going to propound now were handed to me by this American Chinese interpreter who says I was not interrogating the people literally enough. These few questions have been suggested to me and I am adopting them and propounding them now, so let's see what they bring out.

The Court: May I ask the interpreter a question? Did you find any problem relative to understanding the dialect of the witness?

The Interpreter: It is not the dialect. He doesn't give a direct answer.

The Court: What is the dialect?

The Interpreter: See Yip, one of the Toy Shan dialects. [101]

The Court: He is speaking the same kind of

dialect most of the other witnesses have been talking?

The Interpreter: Yes.

The Court: As far as I can recall, we have never had an applicant that didn't come from this particular locality. China is a big country, but they have all been from Toy Shan. I don't know why, but they have all been from there. Are you having any difficulty?

The Interpreter: No. It is just the answers.

The Court: Does he understand what you say?

The Interpreter: I think he does, but instead of giving a direct answer, as the court would like, he tries to say something else.

The Court: Do you have any trouble understanding what he says?

The Interpreter: No, excepting that what he said, I told yesterday verbatim.

The Court: Is there any difference in dialect between any of these witnesses? Did the father and the two boys speak exactly the same sort of dialect?

The Interpreter: Yes. But the others are more intelligent in answering. That is the trouble I had yesterday.

The Court: I just wanted to know if you had any dialect trouble.

The Interpreter: No. [102]

The Court: All right. You can proceed.

Mr. Irwin: The first few questions may be repetitious and I ask the court and counsel's indulgence.

TAM FAY HING

the witness on the stand at the time of adjournment, having been heretofore duly sworn, was examined and testified further, through the interpreter, as follows:

Direct Examination
(Continued)

By Mr. Irwin:

Q. Will you tell us again when you left your village for Hong Kong? A. C.R. 19.

Mr. Irwin: That is what in English, please?

The Interpreter: 1930 or early 1931.

Mr. Irwin: I asked him when he left the village, not when he was born.

The Witness: C.R. 19, first month, 15th day.

The Court: Let me ask this. Ask him again. When did you leave your village to go to Hong Kong to come to the United States?

The Witness: C.R. 39, first month, 15th day.

Mr. Irwin: What year is that?

The Interpreter: C.R. 39. 1950.

Mr. Irwin: What is the rest of it? [103]

The Court: Can't you translate the first month and 15th day?

The Interpreter: I have to make sure, because he doesn't speak very clearly.

The Court: You just said he said 1-15.

The Interpreter: March 3rd.

Q. (By Mr. Irwin): When did he arrive at Hong Kong? A. C.R. 39, 1, 17.

Mr. Irwin: That's when?

(Testimony of Tam Fay Hing.)

The Interpreter: March 5 of the same year.

Q. (By Mr. Irwin): How long did it take you to walk from your village to the waterfront?

A. Half hour or three-quarters of an hour.

Q. How long did it take to take the small junk, to catch the boat from Kong Moon?

A. About half an hour.

Q. After you got on the boat at Kong Moon, how long was it before it sailed?

A. About 4:00 o'clock when it started sailing.

The Court: Is that 4:00 o'clock in the afternoon?

The Witness: Yes, 4:00 p.m.

Q. (By Mr. Irwin): When did you arrive at Kong Moon?

A. The next morning, about 6:00 o'clock.

Q. Did you sleep on the boat that night?

A. Yes, overnight on the boat. [104]

Q. When you woke up, was the boat already in Kong Moon? A. Yes.

Q. After you woke up, what did you do at Kong Moon? A. We transferred to another ship.

Q. How did you transfer?

A. We walked to the other boat.

The Court: You what?

The Witness: We walked to the other boat.

Q. (By Mr. Irwin): When this boat got to Kong Moon, was it tied up at a wharf?

A. Yes.

Q. Do I understand you got off the boat and walked to another boat to Macao, is that it?

(Testimony of Tam Fay Hing.)

A. Yes.

Q. How long did it take to walk from the boat that brought you from Kong Moon to the boat that was going to take you to Macao?

A. Over 10 minutes.

Q. After you got on the boat for Macao, how long was it before that boat sailed; after you got on the boat that was to take you to Macao, how long a time was it before that boat sailed?

A. About 8:00 or 9:00 o'clock before it sailed.

Q. Is that in the morning?

A. In the morning. [105]

Q. When did you arrive at Macao.

A. Evening.

Q. Of the same day? A. The same day.

The Court: What time in the evening? When you say, "in the evening," what do you mean?

Mr. Irwin: I was going to ask him if it was dark.

The Witness: About 6:00 o'clock, I believe.

Q. (By Mr. Irwin): How big a boat was it that took you from Kong Moon to Macao?

A. Larger than the boat that run in the village waters, and it is a steamer, motor steamer.

Q. After you got to Macao about 6:00 o'clock in the evening, what did you do?

A. Nothing much.

Q. Did you go ashore or did you go to another boat, or what did you do?

A. Yes. We transferred to another ship then.

Q. Where was that ship going?

(Testimony of Tam Fay Hing.)

A. That is the one to Hong Kong.

Q. Do you happen to remember the name of that boat? A. Dock Shing.

Q. How big a boat was that?

A. It is bigger than the river boat—excuse me. It is bigger than the village boats. [106]

Q. Did you sleep on that boat? A. Yes.

Q. Do you know how long it was after you got on the boat, the Dock Shing, how long it was before it sailed for Hong Kong?

A. About 12:00 o'clock.

Q. Day or night? A. Night time.

Q. Did I ask this question? I think I did ask about sleeping. Did you have a cabin or did you sleep on deck chairs, or where did you sleep on this boat from Macao to Hong Kong?

A. Those campus chairs in a sort of steerage room.

Q. You say that you sailed from Macao about midnight. What time did the boat arrive at Hong Kong?

A. About early in the morning, say about 7:00.

Q. When did you leave the boat and go ashore at Hong Kong?

A. Little after 7:00, some time around 7:00.

Q. You say you left Macao about midnight and you got off at Hong Kong about 7:00. Was the boat sailing all the time between midnight and 7:00 o'clock the next morning?

A. After we arrive at Hong Kong, there is a

(Testimony of Tam Fay Hing.)

custom tender that must approach the big ship before it can enter the harbor. [107]

Q. How long did it take the boat to sail from Macao to Hong Kong?

A. About three or four hours for sailing, if it were moving.

Q. Do you know, or has anyone told you how far it is by water from Macao to Hong Kong?

A. I was told, the time was told to me by someone.

Q. You said your boat left Macao at midnight, that it took about three or four hours sailing, but that you didn't get off at Hong Kong until 7:00 in the morning. Why did it take that long?

A. I said a while ago before the big ship could enter the harbor of Hong Kong, a tender of the customs department must approach the big ship before they can pull into the harbor, and that is where most of the time is being wasted.

Q. Before the boat pulls into the harbor, are you and the other people questioned by the immigration and customs officials?

A. Not much questioning, except whether you have vaccination.

Q. Is that all done outside before the boat docks? A. Yes.

Q. To go back again to when you got on the boat at Macao, you say that was about 6:00 p.m. at night, is that right? [108] A. Yes.

Q. You say that the boat sailed at midnight?

A. Yes.

(Testimony of Tam Fay Hing.)

Q. What did you do between the time you got on the boat at 6:00 p.m. and the time it sailed at midnight? A. After dinner, I slept.

Q. That is what I wanted to know. Did you have dinner? A. Yes.

Q. Then what did you do after you got through eating?

A. By the time after dinner, 8:00 or 9:00 o'clock, we retired.

Q. You say the boat sailed at midnight. If you retired at 8:00 or 9:00, how do you know the boat sailed at midnight?

A. When the boat start moving, they call a whistle and it woke me up that night.

The Court: May I ask a question?

Mr. Irwin: Certainly, your Honor.

The Court: Did you have a watch with you?

The Witness: The boat has a clock. My third brother tell me so.

The Court: Your brother told you the boat left at midnight?

The Witness: When the whistle was pulled, when I heard the whistle, I asked my brother what time it was and he told [109] me the time. I was a little seasick, too, so I wasn't feeling too good that evening.

Mr. Irwin: I have got him to Hong Kong now, your Honor.

Cross-examine.

Miss Martin: I have a problem here, if your Honor please. If I don't get started on cross-

(Testimony of Tam Fay Hing.)

examination early enough today, I won't be able to complete it as to both plaintiffs without their having an opportunity to get together over the holiday recess. I would like to ask this witness a few questions and perhaps defer the major cross-examination of both witnesses until we take up again.

The Court: I understand you want to quit at noon.

Miss Martin: That isn't my purpose at this point.

The Court: How many more witnesses have you got?

Mr. Irwin: What I was going to ask permission to do is this, subject to objection from the United States Attorney. I understand the father has made this trip from Macao to Hong Kong several times. Your Honor raised the question yesterday about an overnight trip, and this is by way of an offer of proof. It is my information that they got on a ship in the early evening. Then they have dinner. The boat does sail, depending on the tide, somewhere in the late evening or midnight. It is only a three or four-hour passage. It is 40 knots from Macao to Hong Kong. But if a boat arrives off Hong Kong before 7:00 o'clock in the morning, the port [110] does not open until 7:00 o'clock, so it lays off the port until 7:00 o'clock. That is why you have heard these others say that it is overnight, and then again that it is three or four hours. That is why I was going to ask permission to recall the father, because he has made this trip more times, although I under-

(Testimony of Tam Fay Hing.)

stand the father never made the trip from the village to Macao the same way. That trip has been changed since the war. His last trip was 1933.

The Court: Other than the father, have you any other witness?

Mr. Irwin: I have one, but he isn't here now.

The Court: You are going to use him only to try to establish these other points, but they don't know about these applicants?

Mr. Irwin: No. I will say one of them will be short and I don't think will affect the cross-examination. The father handed me some letters this morning and the interpreter told me they are about the fifth son. The father has with him three letters from the fifth son including a report card.

Miss Martin: Are you making an offer of proof?

Mr. Irwin: I am not saying what he said except what my interpreter tells me. There is a report card and two or three letters merely showing there is a fifth son. Whatever weight your Honor might give to the father's difficulty on the birth date, these letters in the last several years [111] from the boy——

The Court: The District Attorney, as far as I know, has never denied that there are children of the names that appear in these various papers.

Mr. Irwin: That is true.

The Court: But the problem the District Attorney has is whether or not these are the children.

Mr. Irwin: That is quite true.

The Court: As far as his fifth son is concerned,

(Testimony of Tam Fay Hing.)

I don't know whether the District Attorney is making any point of the fact that there is a fifth son. As far as I know, there will be no evidence in the case about the fifth son except incidentally.

May I suggest this? I think it is important to cross-examine these boys before taking a recess. I would like to get the cross-examination out of the way this morning.

Miss Martin: I don't think I can make a very short cross-examination of the two boys. In other words, I don't think I can complete my cross-examination of the two plaintiffs within the time remaining.

The Court: You don't want to start then?

Miss Martin: I wouldn't mind asking this witness a very few questions, but I don't want to, because if I start anything of any importance, then the recess will occur and they will have time to get together on it, so I would rather defer [112] all cross-examination until we continue again and have Mr. Irwin complete the witnesses.

Mr. Irwin: I just have this observation. Again, I am entirely sympathetic to your understanding, but suppose we were to adjourn right now until Monday or Tuesday, you would still have a half day and then a two-hour recess before they would come back, so we have the same problem of completing the cross-examination of both of them in a half day. I am not objecting. I just raise that as a point.

The Court: Of course, we could work until 4:00

(Testimony of Tam Fay Hing.)

or 5:00 or 6:00 o'clock this afternoon, except you don't want to.

Miss Martin: I would have been happy to have finished this case, but there has never been a minute that has been used up by the defense. The whole thing is the plaintiffs' case.

The Court: It has taken twice as long to complete this case from the plaintiffs' side as it usually does.

Miss Martin: I can't help that.

The Court: Suppose we go ahead and you complete your case as far as you can go. Where are the other witnesses?

Mr. Irwin: The father is in the hall.

The Court: You may step down.

(Witness withdrawn.)

Mr. Irwin: I felt we were making pretty good time until [113] we ran into this witness yesterday afternoon. This is the first one of these I have tried.

TAM DOCK LUNG

recalled as a witness by and on behalf of the plaintiffs herein, having been heretofore duly sworn, resumed the stand and testified further, through the interpreter, as follows:

Direct Examination
(Continued)

By Mr. Irwin:

Q. You have previously testified you are the gentleman who contends you are the father of the two boys? A. Yes.

(Testimony of Tam Dock Lung.)

Q. How many times have you taken the boat trip from Macao to Hong Kong?

A. I can't recall how many times.

Q. More than once?

A. Many times, many times.

Q. Have you taken the boat that leaves at night from Macao to Hong Kong? A. No.

Q. That's the end of that. Have you with you some letters from your fifth son? A. Yes.

Q. Are you sure you understood me correctly? You have never taken the night boat from Macao to Hong Kong? [114] A. No.

Q. When you have taken the boat from Macao to Hong Kong, what time of the day or night does it travel? A. Daytime.

Q. Is there a night boat, too?

A. There are.

Q. On the day boat, how long is the sailing time from Macao to Hong Kong?

A. Three or four hours we would get there.

Q. Do you know how far it is from Macao to Hong Kong? A. I do not know.

Mr. Irwin: He has in his hand certain letters. What are they? Before we get into reading the letters, let me ask another question.

Q. From whom are the letters?

A. Tam Jing Hing sent them to me.

Q. Is that the boy you have identified as the fifth son? A. Yes.

Q. What are the dates of the letters?

A. I have no glasses. C.R. 18.

(Testimony of Tam Dock Lung.)

Q. Will you look at them?

The Interpreter: May I read them?

Mr. Irwin: Yes, please.

The Interpreter: School record report [115] card.

Mr. Irwin: What is the date?

The Interpreter: I am trying to find it. 37th year, first semester, record of grades.

Mr. Irwin: Does it give the name of somebody?

The Interpreter: Tam Jing Hing.

Mr. Irwin: What is the date?

The Interpreter: 37th year, first semester, junior high school, third year.

Miss Martin: We are not interested in the contents. We want the date.

Mr. Irwin: You haven't given it in English.

The Interpreter: First C.R. 37, that is 1948.

Mr. Irwin: Where is it from?

The Interpreter: Kwangtung Province, Quan Na Middle School.

Mr. Irwin: Is there an envelope that that came in?

The Interpreter: Yes.

Mr. Irwin: Can you give us any postal stamp date on there, Madam Interpreter?

The Interpreter: I see Canton So No. 1, and in Chinese it says Quan Chow, which is Canton.

Mr. Irwin: May I have this marked for identification what has been identified as the report card, and I am going to ask at the recess if the interpreter will make a translation. [116]

(Testimony of Tam Dock Lung.)

The Court: Let's mark it for identification. It will be marked Plaintiffs' Exhibit for identification No. 7.

The Clerk: So marked.

(The document referred to was marked Plaintiffs' Exhibit No. 7 for identification.)

Mr. Irwin: Does he have some other letters there, Madam Interpreter?

The Interpreter: These are two more letters that the son Jing Hing wrote.

Mr. Irwin: What date is on the envelopes, Madam Interpreter?

The Interpreter: This is one from Quan Chow, 38 year, 11th month, 20th day.

Mr. Irwin: What would that be?

The Interpreter: January 8, 1950.

Mr. Irwin: May that be marked for identification, please?

The Court: It may be marked Exhibit 8 for identification.

The Clerk: So marked.

(The document referred to was marked Plaintiffs' Exhibit No. 8 for identification.)

Q. (By Mr. Irwin): Where is the letter? This is just the envelope.

A. The letter is gone. [117]

The Court: That is an envelope only, then?

Mr. Irwin: I will withdraw this, your Honor, unless government counsel wants to look at it. It serves no purpose if it hasn't got anything in it.

(Testimony of Tam Dock Lung.)

Q. Is the other an envelope, too?

A. Yes, from the same town.

Mr. Irwin: I see no point in cluttering up the record.

The Court: Then we will withdraw Exhibit 8 and you may have it back, and we have only Exhibit 7 for identification.

Mr. Irwin: Yes.

The Court: All right.

Mr. Irwin: I have another question along that line.

Q. Why didn't you seek to bring this son into the country with the other two boys? Why hasn't this boy tried to come to the United States?

A. He cannot leave Canton.

Q. Why?

A. He is not allowed to leave while he is studying there.

Q. Not allowed to leave by whom?

A. The Communist regime doesn't allow him to leave.

Mr. Irwin: That's all.

Miss Martin: One question. [118]

Cross-Examination

By Miss Martin:

Q. Why didn't you bring your daughter to the United States?

A. My wife doesn't want her to come to the United States.

Q. Doesn't your wife want to come to the United

(Testimony of Tam Dock Lung.)

States? A. She doesn't like to come.

Miss Martin: No other questions.

The Court: I have a question. You say that the woman in this picture, Exhibit 6, is your wife?

The Witness: No error.

The Court: Have you any other picture of your wife?

The Witness: No.

The Court: This is the only picture that was sent to you showing your wife?

The Witness: No other one.

The Court: Have you any other pictures showing your sons or your daughter?

The Witness: No.

Mr. Irwin: I have another question along that line.

The Court: All right. [119]

Redirect Examination

By Mr. Irwin:

Q. In your village where you lived, are there any cameras? A. Not in my village.

The Court: You know, I started out with the thought it was very difficult to get pictures. I find out now that these people go to the market and in the market they have galleries, picture galleries, and they can get pictures when they want them.

Mr. Irwin: I was going to ask one or two questions.

The Court: All right.

Q. (By Mr. Irwin): How far is it from where

(Testimony of Tam Dock Lung.)

your home is, your village, to the first place where you can have a picture taken? A. Noon Now.

Q. Did you ever have any other pictures of your wife at any time? A. In the village, no.

The Court: This case goes back before either the war or the Communist invasion. In other words, there was a long period of time when this family was of maturity when China was at what they would call peace. There were no Japanese and no Communists. The cases indicate where these people live in a village, they go to nearby markets for the purpose [120] of getting food, and that many of the cases in this district show they have testified there are markets where they go to have pictures taken.

Mr. Irwin: In the other case, the man and wife had a wedding picture taken some distance from the village. We don't have a picture, but the children say when they were little boys, the mother used to show them the wedding picture. However, I asked this man through the interpreter if he had any wedding pictures, and he said no. I would like to ask one other question.

Q. To your knowledge, was your wife ever out of your native village until she went to Hong Kong here within the last two years? A. No.

Q. How many people live in your village?

A. Over 20 years ago. I don't know how many are living there now.

Q. How many were there 20 years ago?

A. I think around 30.

(Testimony of Tam Dock Lung.)

Q. How far was it to the nearest town?

A. Quite a ways. You have to pass many hills before you can get to Toy Shan.

Q. How many hours walking time?

A. That I don't know.

Q. Have you walked it? [121] A. No.

Q. How did you get back to your native village?

A. About 14 or 15 po distance.

Mr. Irwin: What's that?

The Interpreter: About 10 lis to a po.

Mr. Irwin: And how far is a li?

The Interpreter: A li is about a third of an English mile.

Mr. Irwin: And a po is about how many lis?

The Interpreter: A po is about three miles.

Q. (By Mr. Irwin): How many pos?

A. 14 to 15 pos.

Q. 42 miles, would that be the distance?

The Court: Distances in China mean a whole lot more than here. We get in an automobile and go 100 miles and don't think anything about it, but a trip that far in China is something else.

Mr. Irwin: Would you translate that in miles? 14 miles, I guess. You say a li is a third of a mile, and if you get 42 lis divided by 3, that is 14 miles.

The Interpreter: Yes.

The Court: May I ask this witness a question?

Mr. Irwin: Certainly.

The Court: When you returned to the village after coming to the United States, you say there

(Testimony of Tam Dock Lung.)

were only 20 or 30 [122] people living in the village?

The Witness: That's about it.

The Court: Are there any stores in the village?

The Witness: The stores are in the old village.

The Court: How many people are in the new village?

The Witness: Now, I don't know.

The Court: Was the new village built when you were there, when you went back to see your wife?

The Witness: Yes. It was finished when I went back.

The Court: How many houses were in the new village?

The Witness: 21 houses.

The Court: Were there any stores in the new village?

The Witness: No.

The Court: When you went back to visit your wife, where did you buy food?

The Witness: We went to the old village to purchase it.

The Court: You told me there were no stores in the old village.

Mr. Irwin: He said in the new one, there was none.

The Court: All right. Ask him again, were there any stores in the old village?

The Witness: Yes.

The Court: What kind of stores?

The Witness: Provision stores.

(Testimony of Tam Dock Lung.)

The Court: And you bought all your provisions in the old village? [123]

The Witness: Yes.

The Court: How close was the closest market to the new village?

The Witness: There are two names to that market, San Bot Hui or Woon Wo.

The Court: How far was the market from your village?

The Witness: Seven or eight li.

The Court: Seven or eight li?

The Witness: Yes.

The Court: Did you ever go down to the market to buy anything?

The Witness: Some times.

The Court: Was there a place to take a picture at the market?

The Witness: No.

The Court: Did your wife ever go down to the market with you?

The Witness: No.

The Court: Did any of the children go down to the market with you?

The Witness: No.

The Court: You say you sent money back to China for your family while you were here in the United States?

The Witness: Yes.

The Court: To whom did you send it? [124]

The Witness: Before I went back to Hong Kong to some store.

(Testimony of Tam Dock Lung.)

The Court: How did your family get the money from Hong Kong?

The Witness: From the old village, there is an old gentleman that runs back and forth between the old village and Hong Kong for business.

The Court: He would pick up the money?

The Witness: Yes.

The Court: To whom would he give it?

The Witness: To my wife.

The Court: You never sent any money direct to your wife?

The Witness: Sometimes I sent it to the post office in the market place for her.

The Court: Did you send any of the money to any merchant at the market place?

The Witness: They asked somebody to deliver it to my house, the post office.

Mr. Irwin: Your Honor, I think if you pursue it further, the people he sent it to are strangers.

The Court: I know what they do, or at least I know what they say they do. It may be an entirely different story, what they do.

Mr. Irwin: Also, your Honor might care to ask this, and [125] if not, I would like to ask. He was married in 1908. According to Chinese custom, the wife did not move about, in fact she couldn't move freely.

The Court: You can ask any question you want.

Q. (By Mr. Irwin): First of all, how old are you?

A. 65 years old, Chinese calculation.

(Testimony of Tam Dock Lung.)

Q. You were married when?

A. K.S. 34-1-29.

The Interpreter: 1908.

Q. (By Mr. Irwin): Before you were married, where did your wife live?

A. She lived with her parents.

Q. Where, what village?

A. Mow Gon Gek Village.

Q. How far was that from your village?

A. Over a po.

Q. How old was your wife when you were married? A. I am one year older than my wife.

The Court: Let me try to find out something. How many pos are there to a li?

The Interpreter: 10 lis to a po.

The Court: And one li is about a third of a mile, so a po is about 3⅓ miles?

The Interpreter: Yes.

The Court: So this village in our calculation was about [126] 3½ miles away.

Mr. Irwin: His wife's native village?

The Court: Yes.

Q. (By Mr. Irwin): You say there were 20 or 30 people living in the new village. I don't think we have how many people lived in the old village.

The Court: He testified, but you can ask him again.

The Witness: That I don't know.

Q. (By Mr. Irwin): How many were there when you were last in it? A. I don't know.

(Testimony of Tam Dock Lung.)

The Court: How many houses were in the old village?

The Witness: About 300 houses in the old village.

The Court: I thought I asked him that a little while ago.

Mr. Irwin: I think it was the new village.

The Court: There are 300 houses in the old village?

The Witness: Yes.

The Court: Or there was when he was last there.

The Witness: Yes, in the old village.

Q. (By Mr. Irwin): Your testimony is you left China in 1909? A. Yes.

Q. And that you made three trips back to China between 1909 and 1933? [127]

A. That's right.

Q. Why did you not go back to China since 1933?

A. I planned to, I make a passport application, but due to financial trouble, I was unable to materialize that trip.

Q. Did the war in China have anything to do with it? A. I lost my business over here.

The Court: This witness has brought up a new problem in these cases. I have quite a number of them, so it isn't this particular case. I noticed this fifth boy couldn't leave Canton because of the Communists, he testified. Well, if I understand correctly, the Communists control all the mainland of China. Hong Kong is English, but they control

(Testimony of Tam Dock Lung.)

Canton. I would assume that they would control this Toy Shan province. If the Communists are restricting these boys from coming to the United States, why are so many coming over at this time? Why are they being allowed to come? I wonder what the story is.

Mr. Irwin: I was going to go into that, your Honor. I don't want to make any statement. The testimony shows these boys, I think, were in Hong Kong for two years. Their dates of arrival, I believe, are April or May of this year. That would take us back to 1950. With your Honor's approval, I will go into it and ask how these boys happened to get out.

The Court: I am not so much interested in this particular case, but I am interested in the other cases. We have had all these children come in from Toy Shan Province. We have had testimony relative to the Communists and relative [128] to the Japanese, but this is the first intimation we have had in any of these cases that these Communists were refusing to allow youngsters to come to this country. If it is true in Canton, why wouldn't it be true in other parts where the Communists control?

Mr. Irwin: I think I can ask him a question on that.

The Court: All right.

Q. (By Mr. Irwin): You tell us that the fifth son cannot leave Canton because of the Communists? A. Yes.

(Testimony of Tam Dock Lung.)

Q. How were your third and fourth sons able to leave the new village?

A. When they were in the village at that time, they have a pass to get out of the village.

Q. A pass from whom?

A. At that time, there was no restriction yet, so they could give you passes to leave the village.

The Court: Who gave you passes? Who gave the passes?

The Witness: At that time, they weren't so strict, the Communists.

Miss Martin: What time is he speaking about, if I may inquire?

The Court: Well, wait just a minute. The Communists gave the passes? [129]

The Witness: At that time, yes.

The Court: Do you know your boys have passes from the Communists?

The Witness: They got permission and after the permission was granted, the Communists government took back the slip, the permit, we call it.

The Court: How do you know?

The Witness: They told me about it.

Mr. Irwin: I have a suggestion, your Honor. The third boy seemed to be the brighter of the two. Without any interruption and without the father talking to him, I know the Court is desirous to get the facts, so let's ask to have him brought in and have him put on the stand.

The Court: Then let's have the father sit over in the jury box, and call the third son in.

(Witness withdrawn.)

TAM CHUNG FAY

called as a witness by and in behalf of the plaintiffs herein, having been previously duly sworn, resumed the stand and testified further as follows:

Examination

By the Court:

Q. You testified you left the village for Hong Kong in CR 39-1-15, is that correct? [130]

A. Yes.

Q. Before you left the new village for Hong Kong, were there any Communists, or did the Communists have control of your village?

A. I don't know whether they took control or not.

Q. Did you have to get any permission from the Communists to leave your village? A. No.

Q. Did you ever get a pass from the Communists?

A. You mean to ask when I left the village or to go out from the town itself? You mean to go to Hong Kong?

Q. When you left the village to go to Hong Kong in CR 39-1-15, did you have to get a pass?

A. Which bureau do you mean to say?

Q. Which what?

A. Which bureau for permission?

Mr. Irwin: Any bureau.

The Witness: Yes, I asked for permission to go to Hong Kong from the village.

Q. (By the Court): Did they give you a pass, a writen paper? A. Yes.

(Testimony of Tam Chung Fay.)

Q. Where is that paper?

A. After I got out, I have to return it to them, send it back to them. [131]

Q. How did you send it back?

A. Through the mail.

Q. Did your brother get a pass, too?

A. Yes.

Q. What did he do with his pass?

A. The same way.

Q. Did he send it back or did you send it back for him? A. I sent mine.

Q. To whom did you send it?

A. To my village.

Q. Who in your village?

A. For my mother to return it.

Q. You sent it to your mother?

A. After I sent it back to my mother to return to the bureau, I don't know what details happened.

Q. What did the pass say?

A. With our name, all the necessary parts we have to pass through, to let us go through.

Q. Do you remember the wording of the paper?

A. No, not clearly.

The Court: Now we will ask this witness to sit over in the jury box.

Miss Martin: May I ask one or two questions at this point? [132]

Mr. Irwin: May I just ask something before you cross-examine, and then you can go ahead?

Miss Martin: All right.

(Testimony of Tam Chung Fay.)

Redirect Examination

By Mr. Irwin:

Q. Who in the village did you go to get the paper, what was the man's position?

A. The staff of that department.

Q. What department, what staff?

A. The head of the Bo.

The Interpreter: The Bo is something like the head of the village.

Q. (By Mr. Irwin): The head of the new village or the old village?

A. Our Don Hong village.

The Court: Let me ask a question.

Did you get this pass from the head of the village or from the Communists?

The Witness: It is the man in charge of that department, the Bo Jon.

The Court: Is that one of the villagers that was there before?

The Witness: At that time, there was still the Chinese control.

The Court: This pass that you got, you got it from a [133] man, is that right?

The Witness: Yes.

The Court: Was that man one of the villagers you got it from?

The Witness: Yes, one person of the village.

The Court: It was not a stranger that belonged to the Communist Army?

The Witness: No.

(Testimony of Tam Chung Fay.)

The Court: Why did you have to get a pass from a villager to leave the village?

The Witness: Because on account of the chaotic conditions in China.

The Court: Now, Miss Martin, have you got a question or two?

Miss Martin: Yes.

Cross-Examination

By Miss Martin:

Q. Was your mother still in the village at the time you mailed the pass back from Hong Kong?

A. She was in the village. She hasn't even come to Hong Kong yet.

Q. Your mother didn't accompany you to Hong Kong when you had a pass to go to Hong Kong?

A. Just the two brothers of us, just we two brothers left without my mother. [134]

Q. Did your mother ever get a pass and go to Hong Kong after that? A. Yes.

Q. But she didn't go when you went to Hong Kong? A. No.

Q. The man who gave you the pass, was he a Communist? A. No.

Miss Martin: That's all I want to ask at this time.

Redirect Examination

By Mr. Irwin:

Q. How long had he been the man in the village that you got passes from? A. What?

(Testimony of Tam Chung Fay.)

Q. How long had he been the man in charge of the village, how many years?

The Court: Let's put it this way. How long had you known the man from whom you got the pass?

The Witness: I don't know how many years I have known him, but my mother was the one that went and asked for it for us.

The Court: Your mother got the pass for you instead of you getting the pass, is that right?

The Witness: My mother went and got it.

The Court: How long were you in Hong Kong before your mother came to Hong Kong? [135]

The Witness: Several months.

The Court: What do you mean by several months?

The Witness: About four months.

The Court: How long did your mother remain in Hong Kong before she went back to the village?

The Witness: Now she is in Hong Kong even.

The Court: After she came to Hong Kong to see you, did she ever go back to the village, as far as you know?

The Witness: No.

The Court: Now, let's have the other boy.

Mr. Irwin: May we have one other question that may be of interest along that line?

The Court: Yes.

Q. (By Mr. Irwin): Why didn't your mother go back to the village?

(Testimony of Tam Chung Fay.)

A. Her pass was expired and she wanted to go back, but her pass was expired already.

Q. You told the judge your mother got the pass. Did you or your brother go with your mother to see the man about the pass?

A. That I don't know. My mother went and got it for us.

Q. Yesterday you said you went to school in the old village, right? A. Yes. [136]

Q. And it was the old village that your mother went to see the man about the pass?

A. I really don't know where she got it.

Q. Did she tell you the name of the man?

A. No.

Q. Wasn't there a man's name on the pass?

A. I didn't pay attention to it.

Mr. Irwin: All right. I have tried.

The Court: Now, let's have the other boy, and have this one sit over in the jury box.

(Witness withdrawn.)

TAM FAY HING

called as a witness by and in behalf of the plaintiffs, having been previously duly sworn, resumed the stand and testified further as follows:

Examination

By the Court:

Q. You said that you left the village for Hong Kong in CR 39-1-15, is that correct? A. Yes.

(Testimony of Tam Fay Hing.)

Q. You also said that you left the village with your brother, is that correct?

A. My brother, third brother.

Q. Did your mother go with you and your brother to [137] Hong Kong? A. No.

Q. How long were you in Hong Kong before your mother joined you in Hong Kong?

A. She came in CR 40.

Q. How many months later?

A. About four or five months.

Miss Martin: I will ask the Court to ask the father not to coach the witness.

The Court: I thought I heard something over there a while ago but I wasn't sure.

Will you tell the father and son they are not to say anything?

(Interpreter speaking to parties.)

Q. You say your mother joined you four or five months after you had been in Hong Kong?

A. She went in CR 40, about the fifth month.

Q. About what?

A. About the fifth month.

Q. CR 40, about the fifth month. Did your mother ever return to the village while you were in Hong Kong? A. No.

Q. When you left the village to go to Hong Kong, did you have a pass of any kind?

A. I don't remember having one. [138]

Q. You don't remember whether you had a pass?

A. I don't think I have a pass.

(Testimony of Tam Fay Hing.)

Q. When you left the village to go to Hong Kong, were there any Communists in the village?

A. Not quite to our village yet.

Q. Was it necessary to get permission from the Communists to go to Hong Kong? A. No.

Q. Did you send a pass back to the village from Hong Kong?

Did you ever write back to the village when you got to Hong Kong? A. Yes.

Q. To whom did you write?

A. To my mama.

Q. Did you send your mama anything other than just a letter? Did you send her any papers of any kind? A. Yes.

Q. What did you send her? A. Letters.

Q. That is letters that you wrote yourself?

A. Yes, sometimes my brother write, sometimes I do.

Q. You didn't send her any letters or any papers you got from third parties, did you?

A. No. [139]

Mr. Irwin: May we approach the bench?

(The following proceedings took place at the bench outside the hearing of the witnesses.)

Mr. Irwin: May the record show this is not in the hearing of the witnesses, your Honor?

I have in mind, your Honor, the seniority of the sons sometimes enters into this. In other words, the younger boy might not have anything to say about it. Would you care to inquire whether or not

(Testimony of Tam Fay Hing.)

he and his brother had to get permission to leave the village from anybody?

The Court: Yes, I will ask that.

Mr. Irwin: I am as anxious to get the truth as you are. It might be that there was one pass handed to the elder of the two boys.

Miss Martin: The brother's testimony was quite clearly that he just returned his pass.

Mr. Irwin: But maybe he doesn't know about the other.

The Court: And he said, also, the brother returned his pass.

Mr. Irwin: Did he say that, too?

The Court: I will ask him again.

Mr. Irwin: I just wanted to be sure.

(The following proceedings took place in open court.)

Q. (By the Court): When you left the village to go to Hong Kong, did you have to get permission from anyone to make [140] the trip? A. No.

The Court: Miss Martin, have you got any questions?

Miss Martin: No.

The Court: Have you got any other witnesses?

Mr. Irwin: May we just approach the bench again?

(The following proceedings took place at the bench.)

Mr. Irwin: Again I want to be sure that we have covered whether anyone in his family had to get permission for him to leave.

(Testimony of Tam Fay Hing.)

Miss Martin: You can ask him any question you want.

Mr. Irwin: This is Mr. Brennan's case. In the light of this, I don't want to press it any further right now. If we have completely covered this situation here, there is so much disparity. There is certainly a direct contradiction.

Miss Martin: I hope the Court has been noticing the father during this interrogatory.

Mr. Irwin: Has he talked?

Miss Martin: Yes.

Mr. Irwin: Well, he hasn't helped him any.

Miss Martin: That is true.

Mr. Irwin: That is the only question I wanted. I don't want to put leading questions and that is why I was asking if your Honor would do it.

The Court: He says he didn't have any [141] papers.

Mr. Irwin: That's right.

The Court: But I will ask him the question for the record.

Mr. Irwin: Just did anyone, and if he says no or he doesn't know, then we will pass it up, but I would like to then have it go over to Tuesday, because I will want to ask to withdraw.

(The following proceedings were had in open court.)

Q. (By the Court): When you left the village to go to Hong Kong, you said you did not have to get permission from anyone to make the trip?

A. I don't know what permission you mean.

(Testimony of Tam Fay Hing.)

Q. Did you have to speak to anyone before you left the village? A. No.

Q. Did anybody give you a paper when you left the village? A. Yes.

Q. Who?

Miss Martin: Now, I want the record to show before he answered that question, he looked at the father and the father nodded his head. I think definitely the father was telling him the answer. I know it is argumentative to say that, but I want the record to show I noticed it.

The Court: Well, we will have the testimony here. He [142] testified he did not, and now he says he did. I just want to know.

Mr. Irwin: And I want to join with Miss Martin in the statement. I saw the father and the brother both nod in the affirmative before the witness answered. I certainly do not approve of that. I would like to have the interpreter instruct them again that if they indicate by sound or voice or movement any answers, they may be in trouble with the court.

The Court: You might tell them they may be jeopardizing their own case.

Mr. Irwin: That's right.

(Interpreter speaking to parties.)

Q. (By the Court): You said you got a paper when you left the village. From whom did you get the paper?

A. My third brother got it. I don't know what it is all about it.

Q. Can you read?

(Testimony of Tam Fay Hing.)

A. I have been to school.

Q. Did you read the paper you got?

A. He didn't show it to me.

Q. How do you know he got it for you?

A. He told me so.

Q. Did you ever see it?

A. No. My brother handled it.

Miss Martin: May we ask the witness what the brother told [143] him the paper was?

Q. (By the Court): Did your older brother or your No. 3 brother tell you what the paper was?

A. It was a pass of some kind.

The Court: Well, we are not going to finish this case today, so I think it can be continued over until Tuesday. We can finish up this case Tuesday.

Mr. Irwin, I might say I was satisfied yesterday that this boy didn't know very much about that trip from the village to Hong Kong, because he testified differently on three or four different occasions. Now he comes in and refutes the testimony given by the older brother. A very serious doubt arises in my mind in this case.

Mr. Irwin: There is a doubt in my mind about further advocating it, your Honor. These questions were handed to me this morning, as I said, and I wouldn't vouch for them. I would therefore appreciate the matter going over.

The Court: We will recess this case until 10:00 o'clock on Tuesday morning. The court will stand in recess until 10:00 o'clock Monday morning.

(Whereupon, an adjournment was taken to 10:00 a.m., Monday, December 30, 1952.) [144]

December 30, 1952, 10:00 A.M.

The Clerk: No. 13,842, Tam Dock Lung vs. Acheson, further trial, and also the other two cases trailing. . .

(Other court matters.)

Mr. Irwin: As to the case on trial, may it please the court, is your Honor ready to consider that?

The Court: Yes.

Mr. Irwin: Your Honor, before resting, I have not talked to the plaintiff or the two alleged sons since we recessed Wednesday. I would like, pursuant to your Honor's approval, to have the interpreter inquire of the father and the two boys whether they have anything further to volunteer. I do not propose to ask anything further. Does your Honor think that would be appropriate? If not, I would like to rest.

The Court: I don't know about asking for any explanations. The chances are over the week end they have discussed this matter. They have probably arrived at some conclusion among themselves. Of course, I don't know what is going to happen in the future. They may come in and obtain other counsel and make an appeal. Some criticism might be raised about the court, because they weren't allowed to explain.

Mr. Irwin: That is what I had in mind, also, your Honor, the possibility criticism might be directed to the court and to their counsel for having in effect stopped. [146]

The Court: Suppose we call the father up here first.

Mr. Irwin: Will you ask the father to come forward, please?

TAM DOCK LUNG

recalled as a witness by and on behalf of the plaintiffs herein, having been heretofore duly sworn, resumed the stand and testified further, through the interpreter, as follows:

The Court: Will you allow me to do the questioning?

Mr. Irwin: I would be very happy to, your Honor.

The Clerk: Your name again, please?

The Witness: Tam Dock Lung.

Examination

By the Court:

Q. You have testified in this case. Your attorney now indicates that he is ready to rest the case. Do you have any other testimony that you would like to give the court relative to the fact that these two boys are alleged to be your sons?

A. Regarding my sons getting the passes to come, to get out of the village, it was told to me, the information was given to me.

Q. You told us the other day that your sons told you that they had passes. [147]

A. Yes.

Q. Is there any other information you want to give to the court? A. About the fifth son.

(Testimony of Tam Dock Lung.)

Q. What about the fifth son?

A. Because on account of my age and I was a litle confused the other day, I made a mistake in the date of the birth.

Q. What day do you now say your fifth son was born?

A. I remember when my fifth son was born, I was quite excited, because on account of the prematurity of the child, and even now I am not very certain about the date.

Q. Well, when do you say the fifth child was born? A. About the fifth month.

Q. About the what? A. Fifth month.

Q. What year? A. C. R. 20.

Q. C. R. 20, fifth month? A. Yes.

Q. Is there any other information you want to give the court?

A. Because the time when the child was born, my wife and I were pretty excited about it, because the doctor came and tried to save the child, and when my sons asked for information [148] about the fifth son, I gave them the wrong information.

Miss Martin: May we have the interpreter translate C. R. 20, the fifth month?

The Interpreter: From June 16 to July 14.

Mr. Irwin: What year?

The Interpreter: 1931.

Q. (By the Court): Is there anything else you want to tell us?

A. I remember your Honor asked me why we did not ask the fifth son to come to the United States. My wife and I decided for him to study a

(Testimony of Tam Dock Lung.)

little bit more in China before we bring him over to the United States.

Q. Is there anything else?

A. The second reason is my wife is getting on in years and since so many of our boys have already left her to come to the United States to be with me, we deemed it proper to leave a couple of them behind to be with my wife a little longer because she is so old.

Q. Anything else?

A. Regarding my fourth son, comparatively he was born a little slower in mentality. In regards to their arrangement to come to the United States, the third son and the wife—my wife, were the two that manipulated things for the family, and as far as my fourth son is concerned, his memory is [149] sometimes very poor because he is not as intelligent as the third one.

Q. Anything else? A. No other remarks.

The Court: Do you want to ask anything?

Miss Martin: I would like to ask one question.

Cross-Examination

By Miss Martin:

Q. Why do you not bring your wife to the United States?

A. I failed in business a while back and my finance is limited now.

Miss Martin: That's all.

Mr. Irwin: I have one question, your Honor.

(Testimony of Tam Dock Lung.)

Redirect Examination

By Mr. Irwin:

Q. You have not talked with me since we were last in court except here—withdraw that.

You have neither seen nor talked to me since we left court last Wednesday, have you?

A. No. I haven't seen the attorney's face.

Mr. Irwin: Thank you.

The Court: You may step down.

(Witness excused.) [150]

The Court: Let's have the older boy.

TAM CHUNG FAY

recalled as a witness by and in behalf of the plaintiffs herein, having been heretofore duly sworn, resumed the stand and testified further, through the interpreter, as follows:

Examination

By the Court:

Q. When you were on the stand the other day, you told us about the passes that you got when you left your village. Do you want to make any explanation as to the testimony you made the other day?

A. That is a pass to designate that we were permitted to leave the village in order to come to Hong Kong for the United States.

Q. Where did you get the pass?

A. I asked my mother to go to the old village,

(Testimony of Tam Chung Fay.)

to the Bo Fong, which is the head of a group of families.

The Interpreter: Bo Fong is a man that is in charge of a number of families.

Q. (By the Court): You never did read the pass?

A. After my mother gave it to me, I took and looked at it.

Q. Did you read it? [151]

A. I read it and I remember it said something to this effect, that we are allowed to leave the village and all the way to Hong Kong, passing all parts throughout the destination, I mean throughout the itinerary, in order to get to Hong Kong.

Q. Why was it necessary for you to have a pass to leave the village?

A. It was sort of troubled times.

Q. Were any guards around the village?

A. At that time the Communists were coming, but they haven't arrived with any military forces, but it is understood that the villagers must have a pass to leave their village in order to go to Hong Kong, and should they be stopped on their way, they would know they had been okayed by the village group head.

Q. Did you get the pass for your brother?

A. My brother asked me to get the same for him, but I asked my mother to get it for us both.

Q. Did you get a pass for your brother?

A. The same procedure. My brother asked me

(Testimony of Tam Chung Fay.)

to get his pass and I asked my mother to get them for us and I have them both.

Q. Did your brother ever see his pass?

A. All the way through from village to Hong Kong, he hasn't seen the pass because I took care of them, but after I [152] got to Hong Kong, I misplace his pass and I told him I don't know when I misplace the pass.

Q. Why was it necessary to send the pass back to the village?

A. The reason one has to send it back is because it designates you have safely arrived at your destination, which was Hong Kong for us, and there was no occasion for us to keep it, because we didn't have to return to the village.

Q. Do you want to make any other explanation relative to the pass?

A. That's all there is to it, nothing more.

Mr. Irwin: Your Honor might be interested in this custom on passes, how long he had known that might have existed.

The Court: We have had testimony in case after case and there has been no mention of a pass from any of these villages.

Mr. Irwin: I have just one question then.

Redirect Examination

By Mr. Irwin:

Q. I haven't seen or talked with you since we were last in the court room, have I?

A. No. I don't know anybody.

(Testimony of Tam Chung Fay.)

Mr. Irwin: Miss Martin?

The Court: Miss Martin, have you any [153] questions?

Miss Martin: I would like to ask him a number of questions, your Honor, and I think I would like to ask that the No. 4 be taken out of the room while I do so.

Mr. Irwin: Quite agreeable, your Honor.

Cross-Examination

By Miss Martin:

Q. What is the name of the No. 2 brother who was just here in the court room?

A. Tam Hin Soon.

Q. Do you remember the occasion in China when he left for the United States?

A. All I remember was my mother took him to where the little boat was to leave for the United States from the village.

Q. How old were you at that time?

A. I think about 11. You mean myself?

Q. Yes. A. About 11.

Q. You personally remember that your brother left China, your No. 2 brother left China?

A. Yes.

Q. Do you know what year that was?

A. I think it was C. R. 24.

The Interpreter: 1935 or early 1936. [154]

Q. (By Miss Martin): That would be about 15 or 17 years ago?

(Testimony of Tam Chung Fay.)

A. I think about 17 or 18 years ago.

Q. Were you going to school at that time in China? A. Yes.

Q. The questions I am going to ask you are all relating to the time when your No. 2 brother left China. There was a wall that went all around the village where you lived at that time, wasn't there?

A. Not the new village.

Q. Was there a wall that went all around the old village at that time?

A. On the north side, yes.

Q. Are you sure that the wall did not go all around the old village?

A. As far as I can remember, it is on the north side only, separating the new and the old village.

Q. I am still talking about the time when your brother left China.

A. It seems that my memory was that there was one wall on the north side.

Q. At that time when your brother left China, did you have any photographs in the house of yourself or your brothers or your mother?

A. No. [155]

Q. You are sure that there was no photograph hanging in the main room of your house at the time that your No. 2 brother left China? A. No.

Q. Was there ever any photograph of you and your brothers or your sister or your mother in the house in China? A. No.

Q. If there had been a picture in the house of your family at the time that your No. 2 brother

(Testimony of Tam Chung Fay.)

left China, you would have known about it, wouldn't you? A. Yes. There was none.

Q. Is there a room in your house which you call the parlor? A. Yes.

Q. The old village is north of the new village, that's right, isn't it? A. South.

Q. At the time your No. 2 brother left China, what was the name of the market that was nearest to your village?

A. Sam Bot or Woon Wo. It is the same market with two names.

Q. At the time that your brother left China, there was no post office at that market, was there?

A. You mean the Sam Bot Hui?

Q. Yes. [156] A. There was one.

Q. There was a post office in the Sam Bot market?

A. Sam Bot Hui, yes. Not in the village.

Q. I am talking now about the time when your brother left China 13 years ago, as to whether there was a post office in Sam Bot market then.

A. I remember several years after my brother left, I knew that there was one in Sam Bot market.

Q. At the time your brother left China, did you have to cross any stone bridges to get to that market?

A. If we leave our village to go to the market, we have to pass through a bridge.

Q. What kind of a bridge? A. Stone.

Q. Will you describe the clock that you had in the house at the time that your brother left China?

A. At that time there was no clock.

(Testimony of Tam Chung Fay.)

Q. When did you have a clock?

A. There was no clock in the house even until the time we came to Hong Kong.

Q. Do you know the village named Sai Dock Do?

A. It is south of our village.

Q. How far? A. Over 10 jongs.

The Interpreter: One jong is 10 feet. [157]

The Court: That would be 100 feet then.

Mr. Irwin: Didn't you tell us it was a li?

The Interpreter: 10 feet equals one jong.

The Witness: I know that it is 10 feet, it is one jong, that is what I know.

Q. (By Miss Martin): How far away was the Sai Dock New Village from your village?

A. Over 10 jongs.

Q. Do you know how many lis?

A. I can't figure by lis, but I know it is over 10 jongs.

The Court: May I ask you this? Could you see the village from your home village?

The Witness: Yes.

The Court: Was it close?

The Witness: Almost adjacent to our village on the south side.

Q. (By Miss Martin): Where is Li Toong Village?

A. I can't identify Li Tong. There is a Ling Tong?

Q. Where is that?

A. It is north of our village.

(Testimony of Tam Chung Fay.)

Q. Do you remember when you talked to the Consul in Hong Kong?

A. Not too clearly, but I remember some.

Q. He asked you a lot of questions about your village. [158] Do you remember that?

A. There was questions. I don't remember what he asked, but we were questioned there.

Q. He asked you what school you attended. Tell us what the name of the school was.

A. I studied at the Dong Hong Old Village, Ng Uk Saing School.

Q. You told the Consul that no girls attended that school. Do you remember that?

A. I said no girls were in my class but they were in the school.

Q. How many girls were in the school?

A. The first year when I went there, there were no girls in the school. The second year, about five of them came.

Q. Do you remember telling the Consul that your sister was in school, but there were no other girls in school?

A. No. I said that whether there were any or not, I did not know, but my mother brought my sister to school.

Q. Is it now your testimony that you don't know whether there were any girls in that school or not?

A. I said the time we went to school, whether there were girls or not, I did not know, but my mother brought her to school.

Q. What do you say now as to whether or not

(Testimony of Tam Chung Fay.)

other girls ever attended that school that you attended? [159]

A. Studying with my class, no. In the school, yes, As far as I remember, there were a few the second year I entered.

Q. Is there a river near the village where you lived?

A. There is no such thing as we can call a river there but there is something we call Way.

Miss Martin: Will the interpreter tell us what is a Way?

The Witness: This Way is sort of a body of water. When rain came, it is fuller. When there is no rain, it is drier.

Q. (By Miss Martin): I show you a document and call your attention to the signature in Chinese at the bottom of the page and ask you if that is your signature.

A. The upper one, yes, is mine.

Q. Do you remember the occasion when you talked to the United States Consul and you made that signature?

A. It was never read to me what was in this paper here but I was asked to make a signature, so I signed the name to it.

Q. At the time that you were there at the Consul, did they ask you questions through an interpreter?

A. Yes.

Q. Did you answer those questions truthfully?

A. Yes. I answered questions that were asked of

(Testimony of Tam Chung Fay.)

me, but I do not read English and I don't know how they record my answers. [160]

Q. At the time when those questions were asked you, that was about October, 1951?

A. It was in June, 1951, I was questioned.

Q. And then you were questioned several months later, were you not?

A. Yes, some time in the 10th month, we were asked again questions.

Q. Do you remember the Consul, Mr. O'Donohue? A. I did not know the name.

Q. This statement with your signature on the bottom purports to be a translation of the questions and answers that were asked there in October. I am going to read——

Mr. Irwin: Just a minute. I understand the District Attorney now is about to read from a purported translation of questions purporting to have been addressed to this witness in China some years ago. In the light of the witness' answers, your Honor, I must object to any direct interrogation or quotation from that alleged statement.

The Court: Don't you think it is proper to ask the witness if he said so-and-so upon a certain date?

Mr. Irwin: Yes, but she started out saying, "I am going to read from a statement." He said it wasn't read, that he was told to sign it.

The Court: Then ask him if the question wasn't asked him and did he make that answer. [161]

Mr. Irwin: That is quite right, but may I ask something else? Is it not the responsibility of the

(Testimony of Tam Chung Fay.)

United States Attorney when they seek to impeach on that ground or objection is made, to be prepared, in the event he answers no, to produce an accurate translation of what took place? Otherwise, they leave an unfair inference in the court's mind.

The Court: We have never got that far. You may raise the issue.

Mr. Irwin: I want a full inquiry, your Honor.

The Court: I doubt very much if the District Attorney can lay a foundation sufficient for the introduction of the document.

Mr. Irwin: I do, too.

The Court: I don't think that is possible.

Miss Martin: Not without getting the Consul from China to testify that they correctly interpreted.

The Court: It can be done, but it can't be done feasibly.

Miss Martin: That's right.

The Court: However, I do think it is proper to ask the witness, weren't you asked so-and-so and wasn't this your answer.

Mr. Irwin: That's all right, but the witness again stated, and I feel a responsibility here, he stated earlier, and I considered the previous questions as in effect voir dire, [162] that he didn't remember the questions that were propounded.

The Court: But can't the District Attorney say, "Well, now, weren't you asked this question and isn't this your answer?"

Miss Martin: I usually ask it that way.

(Testimony of Tam Chung Fay.)

The Court: If he says no, then it is up to the District Attorney to establish evidence that the question was answered differently.

Mr. Irwin: That is my point exactly.

Miss Martin: I will withdraw the pending question and pose another one.

Mr. Irwin: All right.

Q. (By Miss Martin): Do you recall at the time in October, 1951, that you were asked questions before the Consul through an interpreter, that you were asked the following question and that you gave the following answer:

"Q. Were there any girls in your school in the nine years that you attended? A. No."

A. I said, "In my class, no."

Q. Do you recall that you were asked the question:

"Q. Were there any girls in your school in the nine years that you attended?"

A. To me the question was that during the nine years school, were there any girl schoolmates in your class and I [163] said no.

Q. Do you remember in October, 1951, that the Consul asked you, through the interpreter, the following questions and you gave the following answers:

"Q. Was the school that you attended co-educational? A. No.

"Q. How did you sister go to this school?"

Mr. Irwin: May I suggest one question be asked at a time?

(Testimony of Tam Chung Fay.)

Miss Martin: All right. I will stop at the end of the first one.

The Witness: It was not asked that way. All I remember they asked were there any girls in my class and I said no.

Q. (By Miss Martin): Do you remember you were asked the following question and gave the following answer:

"Q. How did your sister go to this school?

"A. Well, the school did not turn down girl applicants. It was during the time that I attended school that no girls applied at that school."

A. I answered the question by saying that my mother brought my sister to school and she went to school.

Miss Martin: I have no further questions.

Mr. Irwin: I think one question is suggested, your Honor. [164]

Redirect Examination

By Mr. Irwin:

Q. You seem to make a distinction between school and class. What do you mean by that distinction?

A. When I say same class room, it is in the same study room. If it is the same school, it means the entire school.

Mr. Irwin: I have nothing further.

Miss Martin: That's all from this witness.

The Court: You may step down.

(Witness excused.)

The Court: Now we should have the other boy.

Miss Martin: I would like to call the witness Tam Soon, the party who has been admitted, to ask him three questions.

The Court: All right.

Mr. Irwin: That is the No. 2 son, Mr. [165] Bailiff.

TAM HIN SOON

recalled as a witness by and on behalf of the plaintiffs herein, having been heretofore duly sworn, resumed the stand and testified further, through the interpreter, as follows:

Cross-Examination

By Miss Martin:

Q. You left China in 1935 to come to the United States?

The Court: You mean C. R. 24.

The Interpreter: That's right.

Q. (By Miss Martin): At that time, do you recall whether or not there were any photographs in your home of you or your brothers or your mother?

A. No.

Q. Wasn't there a photograph of your mother and yourself and your younger brothers hanging on the wall in the parlor of your house in the village that you left? A. No.

Q. Do you recall when you arrived in the United States that the Immigration and Naturalization Service asked you a lot of questions?

A. I don't remember what was asked of me.

(Testimony of Tam Hin Soon.)

Q. You do remember you were asked questions and you gave answers? A. Yes.

Q. And you were questioned through an interpreter? [166] A. Yes.

Q. Do you remember that you were asked the following question and gave the following answer:

"Q. Describe your home in the village.

"A. It is a one-story green brick building consisting of two regular bedrooms, two spare bedrooms, two corridors, a parlor and an open court. There are concrete floors in all the rooms and tile roofs. There are two skylights, one in each bedroom. There is an outside window in each of the bedrooms. They are protected with iron bars and wood shutters. No glass. There are no other windows. There are two outside entrances, one on the south side and the other on the north side, which is the large door. There is no shrine locked in the house. There is a loft in each of the bedrooms. There are no clocks, but there is one photograph of my mother, myself, and of my younger brothers and sisters hanging on the wall in the parlor. It is about 10x12."

Mr. Irwin: 10x12 in what measurement?

Miss Martin: That is the answer.

Mr. Irwin: What is the date of the statement? I don't believe you identified it. [167]

The Court: The question was when he came to the United States. Maybe we'd better establish the date when he did come.

Miss Martin: We have got that established as 1935.

(Testimony of Tam Hin Soon.)

Mr. Irwin: I don't want to be capricious, but she is just reading from an unidentified page. You haven't said it is a part of any document or what date it is. Someone could have slipped it in.

Miss Martin: Suppose I want to read that question from a page I wrote on. I asked if he was asked that question and gave the answer. He has previously testified he was questioned.

The Court: Mr. Irwin wants to know when the question was asked. Was it asked yesterday?

Miss Martin: I laid that foundation. I asked him if he remembered when he came to the United States was he asked questions by the Immigration and Naturalization Service at that time and was it through an interpreter.

The Court: I do remember you did establish that now. Well, I think the objection is not good. You can read the question to the witness and the answer.

The Witness: I said there were only two bedrooms and four sort of corridors. There were two regular bedrooms.

Miss Martin: Don't ask him questions but just tell the reporter what he says and then continue with the question. [168]

The Interpreter: I can't understand him because he talks too fast.

Miss Martin: Will you tell the reporter what he said?

The Witness: There were two regular bedrooms and sort of four corridors.

(Testimony of Tam Hin Soon.)

The Interpreter: Then he was explaining what the corridors are.

Miss Martin: Go ahead.

The Interpreter: What do you want now?

Miss Martin: Ask him, have you finished your explanation about the corridors?

The Interpreter: He said for me to finish reading and then he will explain.

Miss Martin: Is he saying yes now?

The Interpreter: Approval.

The Witness: There are only two openings.

The Interpreter: Shall I go ahead?

Miss Martin: Yes.

The Witness: Yes. It is called the big door.

Miss Martin: All right, continue.

The Witness: Right.

Miss Martin: Go ahead.

The Witness: I never described it as a picture in the house. If there were one, it is different.

Q. (By Miss Martin): Regarding the other items mentioned [169] in the answer, are all the other items correct?

A. Yes. The two bedrooms, then the two other smaller rooms that are spare rooms.

Q. And you told the United States Consul about those facts? A. No, not to the Consul.

Q. To the Immigration. You told it to the Immigration people when you arrived in the United States?

A. I didn't describe that there was a picture in the house.

(Testimony of Tam Hin Soon.)

Q. But you did tell the Immigration about the other facts, about the bedrooms and the green brick building and the two corridors?

A. Yes. I described to the Immigration I had a parlor in my house, two bedrooms and two smaller rooms in the village home.

Q. But you now say you never told them about any photograph in the parlor of yourself, your brothers, and your mother? A. No.

Q. Did you never have a photograph taken of yourself while you were in China?

A. The time when I took pictures was when I had to make applications to come to the United States.

Q. Was that a picture of yourself alone or with your [170] family? A. My own self.

Miss Martin: That's all.

The Court: Any questions?

Mr. Irwin: No, your Honor.

The Court: Well, I notice it is 11:00 o'clock. We will take our recess. We will recess until 15 minutes after 11:00.

Mr. Irwin: May we suggest No. 4 son, who hasn't been interrogated, should be instructed not to converse with the other witnesses?

The Court: Supposing we have the No. 4 son come in here and sit in the jury box during the recess so he can't talk to anybody.

Mr. Irwin: All right.

(Recess.)

Miss Martin: Counsel has agreed to stipulate with me that the last question which I asked the witness Hin Soon where the questions and answers were read, those were from a transcript of a hearing before the Immigration and Naturalization Service on November 6, 1953, at San Pedro, California, in the Matter of Tam Hin Soon, who had then arrived in the United States and was seeking admission to the United States.

Mr. Irwin: With the addition that it was an English transcript.

Miss Martin: An English transcript. [171]

Mr. Irwin: So stipulated, your Honor.

The Court: All right.

Miss Martin: Would your Honor care to ask the same questions of the fourth son?

The Court: Yes. Ask him to take the stand, will you?

TAM FAY HING

recalled as witness by and in behalf of the plaintiffs herein, having been heretofore duly sworn, resumed the stand and testified further, through the interpreter, as follows:

Examination

By the Court:

Q. The other day when you were on the witness stand, some questions were asked you relative to a pass to leave the village and go to Hong Kong. Do you now want to make any statement or any explanation of your testimony the other day?

A. In the one case of the pass, my third brother

(Testimony of Tam Fay Hing.)

was the one that was in charge of it with my mother. When you asked me, I did not remember about the situation at all at that time.

Q. Do you remember now?

A. Now I remember.

Q. How do you happen to remember now?

A. At the time when you asked me, I didn't remember [172] about that situation at all.

Q. Has your brother told you about the pass over the week end?

A. Yes, he told me that there was one.

Q. And that is why you remember now, is that right? A. Yes.

Q. What statement do you want to make now relative to the pass? A. Yes.

Q. Do you want to make a statement about the pass? A. There was a pass.

Q. Did you ever see it?

A. When my brother went to Hong Kong, he lost it. That is why I never saw it.

Q. Did you ever see it?

A. My brother didn't show it to me. He just told me about it.

Q. Then you never did see the pass?

A. No.

Q. All you have is what your brother said, that there was a pass? A. Yes.

Q. On your way from your village to Hong Kong, did you have to show the pass to anyone?

A. No. My brother was in charge of all our arrangements. [173]

(Testimony of Tam Fay Hing.)

Q. Did your brother have to show the pass to anyone? A. I don't remember.

Q. When did your brother tell you that he had sent the pass to his mother at the home village?

A. After we arrived in Hong Kong, not long.

Q. He told you that he had sent the pass back to your mother?

A. That is what he said in Honk Kong.

The Court: I have no other questions.

Direct Examination

By Mr. Irwin:

Q. You haven't talked with me or seen me since we were last in court until you came in here this morning, have you? A. No.

Mr. Irwin: Nothing further, your Honor.

The Court: Miss Martin, do you have anything further?

Miss Martin: No, your Honor.

The Court: All right, you may step down.

(Witness excused.)

Mr. Irwin: Mr. Clerk, does the record show all exhibits which were marked for identification were offered and received in evidence? [174]

The Court: I will make a blanket order. If they weren't admitted in evidence, they may now be admitted.

Mr. Irwin: Except 7, your Honor. That was the blank envelope with nothing in it. It is marked for

identification. It isn't material so I ask to have it withdrawn.

The Court: If there is no objection, 7 can be withdrawn.

Miss Martin: No objection.

Mr. Irwin: Do you see any pertinency in it?

Miss Martin: I have no objection.

Mr. Irwin: On the other hand, your Honor, the father produced it. Maybe I'd better ask to have it received.

The Court: It can be received.

Mr. Irwin: I am always thinking about a possible successor.

Miss Martin: Is there a translation attached to it?

Mr. Irwin: No.

Miss Martin: I object to it being admitted without a translation.

The Court: It may be admitted for whatever purpose it has.

Miss Martin: It can have no purpose at all unless we know what it says.

The Court: It has been marked for identification. It may be admitted, but it has nothing to do with the decision in this case. [175]

Miss Martin: I think we'd better have a translation. We don't know who is going to appeal.

The Court: Can you stipulate the letter can be translated by the interpreter and the translation attached to the letter?

Mr. Irwin: Certainly.

The Clerk: Is that in evidence, then, your Honor?

The Court: In evidence.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 7.)

Mr. Irwin: Whereupon, the plaintiff rests.

Miss Martin: Nothing further.

The Court: Well, I don't think it is necessary for the parties to argue the case. These cases are all based upon a question of fact. These are very difficult and unsatisfactory cases to try, not only from the point of view of the attorneys, but also from the point of view of the court. Citizenship is something that shouldn't be lightly taken away from an individual. On the other hand, it should not be lightly given to an individual unless there is some substantial proof that the individual is entitled to citizenship. When a question of doubt is raised in the mind of the trial judge, he must consider that. I am of the opinion the plaintiff hasn't sustained the burden of proof and there are substantial questions in this case that have arisen in the mind of the court. I feel that [176] there are so many discrepancies in the testimony that the testimony of the witnesses cannot be relied upon. If I had a jury here, I would instruct the jury that if the jury found that a witness was not telling the truth in one instance, the jury could disregard the testimony in other instances if it so desired.

Consequently, I am of the opinion that because of the discrepancies in the testimony between the father and the two sons involved, that the plaintiff has not sustained the burden of proof.

Judgment will be rendered in favor of the government and against the plaintiffs.

Court will now stand in recess until 10:00 o'clock tomorrow morning. [177]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 24th day of July, 1953.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed August 14, 1953. [178]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 27, inclusive, contain the original petition to establish nationality, etc.; Application for and Order Appointing Guardian Ad Litem; Answer; Minutes of the Court for December 30, 1952; Findings of Fact and Conclusions

of Law; Judgment; Notice of Appeal; Order Extending Time to Docket Appeal; Stipulation and Order Substituting Party Defendant; and Designation of Record on Appeal which, together with the original exhibits and reporter's transcript of proceedings on December 23, 24, and 30, 1952, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 14th day of August, A.D. 1953.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13975. United States Court of Appeals for the Ninth Circuit. Tam Dock Lung, as Guardian Ad Litem for Tam Chung Fay and Tam Fay Hing, Appellant, vs. John Foster Dulles, as Secretary of State, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 17, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13975

TAM DOCK LUNG, as Guardian Ad Litem for TAM CHUNG FAY and TAM FAY HING, and TAM CHUNG FAY and TAM FAY HING,

Appellants,

vs.

JOHN FOSTER DULLES as Secretary of State,

Appellee.

STATEMENT OF POINTS AND DESIGNATION OF RECORD ON APPEAL

To the Honorable United States Court of Appeals for the Ninth Circuit:

Comes now the appellants, Tam Dock Lung, as Guardian Ad Litem for Tam Chung Fay and Tam Fay Hing, and Tam Chung Fay and Tam Fay Hing, and set forth their statements on appeal and designation of the record on appeal as follows:

Statement

1. The trial court erred in excluding Tam Chung Fay and Tam Fay Hing, the real parties in interest and the plaintiffs, from the court room during the entire trial and proceedings, except when they were witnesses.

2. The trial court erred in considering alleged inconsistencies with reference to the fifth child of

Tam Dock Lung, as he was not a party plaintiff or petitioner herein.

3. The court erred in not declaring the plaintiffs, Tam Chung Fay and Tam Fay Hing, as citizens of the United States, in view of the lack and failure of any evidence to the contrary adduced or introduced by the defendant.

Designation of Record

1. All of reporter's transcript of proceedings on trial.
2. Answer.
3. Minutes December 30, 1952.
4. Findings of Fact and Conclusions of Law.
5. Judgment.
6. Notice of Appeal.
7. Order Extending Time to Docket Appeal.
8. Stipulation and Order Substituting Party Defendant.
9. This designation.
10. Any designation by Appellee of additional portions of Record on Appeal.

/s/ WILLIAM E. CORNELL.

Dated: September 4, 1953.

[Endorsed]: Filed September 7, 1953.

No. 13975.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TAM DOCK LUNG, as Guardian *ad Litem* for TAM CHUNG FAY and TAM FAY HING, and TAM CHUNG FAY and TAM FAY HING,

Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

BRIEF FOR APPELLEE.

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Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

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IN THE

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FOR THE NINTH CIRCUIT

TAM DOCK LUNG, as Guardian *ad Litem* for TAM CHUNG FAY and TAM FAY HING, and TAM CHUNG FAY and TAM FAY HING,

Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

The District Court has jurisdiction of this action under the provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903).

Judgment for the defendant, John Foster Dulles, as Secretary of State, who was timely substituted as appellee in the action, and against each of the plaintiffs, that said plaintiffs are not citizens or nationals of the United States, was docketed and entered February 13, 1953 [T. R. 17]. There being no dispute that the Judgment entered by the District Court is a final Judgment, this Court has jurisdiction of this appeal pursuant to the provisions of Title 28, U. S. C., Sections 1291 and 1294(1).

Statement of the Case.

This is a case in which the plaintiffs seek to prove they are the sons of a Chinese, Tam Dock Lung, alleged to be an American citizen, and who was admitted to the United States in 1909 by the Immigration and Naturalization Service as the son of a native. The plaintiffs were allegedly born in China, in 1925 and in 1927, respectively, and now seek to come to the United States as the sons of an American citizen. The action was filed on their behalf while they were still in China, after the State Department denied them passports. The plaintiffs came here on temporary permits pursuant to the provisions of Section 503 of the Nationality Act of 1940, set out in Appellants' Brief, for the purposes of trial, and the conditions of such permits are that they return to China if they fail to establish their American citizenship.

The District Court, after hearing the testimony of the plaintiffs and their witness, gave judgment for the defendant, that the plaintiffs were not American citizens and were not the sons of Tam Dock Lung. The principal question on this appeal is whether or not that decision by the District Court should be affirmed. In other words, the appellants ask the Court of Appeals to reverse the findings of the trier of the facts, the District Court.

The second question is, whether or not it was error to exclude plaintiffs from the courtroom during testimony of other witnesses, when their attorney waived their right to be present in the courtroom during that period.

Summary of Argument.

I.

WHERE COUNSEL FOR PLAINTIFFS WAIVED THE RIGHT OF PLAINTIFFS TO BE PRESENT IN COURT DURING PORTIONS OF THE TESTIMONY BY WITNESSES ON BEHALF OF PLAINTIFFS; WHERE PLAINTIFFS' COUNSEL WAS PRESENT AT ALL TIMES; AND WHERE THE ISSUES WERE DETERMINED BY THE COURT WITHOUT A JURY, PLAINTIFFS CANNOT NOW CLAIM ERROR.

II.

THE BURDEN IS ON APPELLANTS TO PROVE THEIR ALLEGED UNITED STATES NATIONALITY AND THEY FAILED TO SUSTAIN THAT BURDEN.

A. THE TRIER OF FACTS MAY REFUSE TO CREDIT A WITNESS' TESTIMONY EVEN THOUGH THAT TESTIMONY IS NOT CONTRADICTED.

B. THE DISTRICT COURT WAS ENTITLED TO DISBELIEVE THE TESTIMONY OF TAM DOCK LUNG, ALLEGED FATHER OF PLAINTIFFS, BECAUSE OF CONFLICTING TESTIMONY ABOUT THE BIRTH OF HIS FIFTH SON.

C. CONTRADICTORY TESTIMONY REGARDING NECESSITY OF A PASS TO LEAVE PLAINTIFF'S NATIVE VILLAGE FOR HONGKONG AND THE DEMEANOR OF TAM FAY HING, PLAINTIFF, ON THE WITNESS STAND, LED THE COURT TO DISCREDIT TESTIMONY FOR PLAINTIFFS.

ARGUMENT.

I.

Where Counsel for Plaintiffs Waived the Right of Plaintiffs to Be Present in Court During Portions of the Testimony by Witnesses on Behalf of Plaintiffs; Where Plaintiffs' Counsel Was Present at All Times; and Where the Issues Were Determined by the Court Without a Jury, Plaintiffs Cannot Now Claim Error.

The cases under Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) are tried to the court without jury. There is no question but that counsel for plaintiffs was present at all stages of the proceedings.

There is no dispute that Tam Chung Fay and Tam Fay Hing, who filed the action in their own names and also by Tam Dock Lung, their alleged citizen father, as Guardian *ad Litem,* were necessary parties to this action to declare their status as citizens and nationals of the United States. The cases cited by appellants, regarding the necessity of an "indispensable party" being before the Court, refer to the necessity of such parties being named as parties to the action and service of summons thereon if they are other than plaintiffs, in order that the Court may obtain jurisdiction over the persons of the parties, as well as the subject matter of the action. But the fact that plaintiffs are necessary and indispensable parties to the suit has no bearing on, and is not determinative of the question of whether or not during the trial of this civil action such parties *must* be personally present in Court, or whether, through counsel, they may waive their right to be present in Court at the trial.

Amendment VI to the Constitution of the United States, which provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . .", is not applicable to this case.

It is clear from the Transcript of Record [T. R. 21, 22] that Mr. Irwin, counsel for plaintiffs, waived their right to be present during certain portions of the trial. Because of its importance the Transcript of Record at pages 21 and 22 are quoted herewith:

> "The Court: We have adopted the procedure in these cases of excluding all witnesses except the plaintiff. We have the direct examination of all the witnesses before there is any cross-examination.
>
> Mr. Irwin: That is quite agreeable, your Honor.
>
> The Court: That eliminates the accusation that the witnesses got together after cross-examination and fixed up the stories.
>
> Mr. Irwin: That is quite understandable, your Honor.
>
> The Court: It is for the protection of the plaintiffs as well as the government.
>
> Mr. Irwin: It is an assurance to counsel, because we are dealing in a foreign language. When your Honor speaks of the plaintiffs, you mean the guardian *ad litem,* I take it.
>
> The Court: The guardian *ad litem* is usually a witness.
>
> Mr. Irwin: He will be a witness.
>
> The Court: I am talking about the boys.
>
> Mr. Irwin: There are two boys in this case.
>
> The Court: I will allow the two boys to remain in the court room and exclude the guardian, or I will

allow him to remain in the court room and exclude the two boys.

Mr. Irwin: The guardian will be the first witness. It really makes no difference.

The Court: Let's exclude the two boys then. The guardian is really the plaintiff. We will exclude everybody except the guardian *ad litem.*

Mr. Irwin: Will the bailiff show them where to go?

The Court: We'd better have the interpreter tell them.

Mr. Irwin: Shall the interpreter be sworn and then advise them?

The Court: You can advise them before you swear her to tell them where to go."

It was the original intention of the Court to exclude all witnesses from the court room except the witness on the stand and to allow the plaintiffs to remain in the court room. However, in the colloquy with attorney for plaintiffs *(supra)* it was suggested that the plaintiffs be excluded while the guardian *ad litem,* their alleged father, was testifying as a witness. This was then done. It is not true, however, that the plaintiffs were excluded from the court room during the entire trial, except for the times that they were personally on the witness stand. While plaintiff Tam Chung Fay was testifying [T. R. 129 *et seq.*] both the alleged father, Tam Dock Lung, and the alleged brother, plaintiff Tam Fay Hing, were present.

At the conclusion of the testimony of the alleged father [T. R. 128] the Court said: "then let's have the father sit over in the jury box, and call the third son in." The Court referred to Tam Chung Fay as the third son.

Thereafter Tam Chung Fay started to testify and the Court said [T. R. 130] at the conclusion of certain questions: "Now we will ask this witness to sit over in the jury box." Then while Tam Dock Lung, the alleged father, and Tam Chung Fay sat in the jury box right next to the witness box, Tam Fay Hing, the other alleged son, was called to the witness stand [T. R. 134]. It was during the testimony of Tam Fay Hing [T. R. 135 *et seq.*] that the alleged father and Tam Chung Fay seriously prejudiced their case; they attempted to communicate to the witness answers to certain questions. This matter was first raised in the following manner [T. R. 135]:

> "Miss Martin: I will ask the Court to ask the father not to coach the witness.
>
> The Court: I thought I heard something over there a while ago but I wasn't sure. Will you tell the father and son they are not to say anything?"

Further [T. R. 138]:

> "I hope the Court has been noticing the father during this interrogatory.
>
> Mr. Irwin: Has he talked?
>
> Miss Martin: Yes."

And further [T. R. 139] after other questions were asked Tam Fay Hing, the following is contained in the record:

> "Miss Martin: Now, I want the record to show before he answered that question, he looked at the father and the father was telling him the answer. I know it is argumentative to say that, but I want the record to show I noticed it.

The Court: Well, we will have the testimony here. He testified he did not, and now he says he did. I just want to know.

Mr. Irwin: And I want to join with Miss Martin in the statement. I saw the father and the brother both nod in the affirmative before the witness answered. I certainly do not approve of that. I would like to have the interpreter instruct them again that if they indicate by sound or voice or movement any answers, they may be in trouble with the court.

The Court: You might tell them they may be jeopardizing their own case.

Mr. Irwin: That's right."

There are good reasons why the Court, after trying many of these Chinese citizenship cases, has arrived at a method of procedure which excludes all witnesses from the courtroom except the witness on the stand.

In questioning witnesses, particularly members of the family, with regard to collateral facts, about which members of the family or their close friends should all be in agreement, if the witnesses are telling the truth, all witnesses sitting in the courtroom who hear the testimony will be able to confirm it when it comes their time to testify. The only way in which the corroboration of such witnesses can be given any weight by the Court in arriving at the truth, is for such witnesses to be excluded from the courtroom, while the Court is allowing the examination to proceed into collateral matters.

As was said by this Court in the case of *Siu Say v. Nagle,* 295 Fed. 676, "In cases of this character experience has demonstrated that the testimony of the parties in interest as to the mere fact of relationship cannot be safely

accepted or relied upon. Resort is therefore had to collateral facts for corroboration or the reverse." And again in the case of *Wong Foo Gwong v. Carr,* 50 F. 2d 362, this Court said: "The immigration officials must necessarily base their decisions upon conflicts or agreements that arise in the testimony of applicants for admission and that of their witnesses."

It is for this reason also that the Court sometimes allows partial cross-examination of a plaintiff party to the action while certain witnesses are excluded from the courtroom, so that later such witnesses can be questioned upon the same matters and if they corroborate such facts, the Court can then give greater weight to such testimony and determine the credibility of the parties. Likewise if the witnesses fail to corroborate the story of the parties on such matters, the Court gives less weight to the credibility of the parties and the burden of the plaintiffs to establish the fact that they are citizens continues.

In arriving at this procedure, consideration has been given to the fact that the parties were born and usually have lived in China all of their lives until the present action is filed, that they and their witnesses are the only persons who know the necessary facts to prove their citizenship, and that the defendant, the Secretary of State, has no affirmative evidence with which to go forward. The defendant must rely entirely upon impeaching the testimony of the plaintiffs and their witnesses, or on developing discrepancies between the testimony of the plaintiffs and their witnesses with regard to facts which should be a matter of common knowledge among members of the family or close friends, so as to discredit the testimony.

This procedure did not prejudice the plaintiffs' case because when plaintiffs were not in the courtroom, the only persons testifying were witnesses on behalf of the plaintiffs who were to be cross-examined by the defense. Where, as here, plaintiffs through their counsel made no objection, but in fact consented to leave the courtroom, there can be no error.

It is an odd commentary that when the alleged father and one plaintiff were sitting in the jury box during examination of the second plaintiff that their efforts to convey to him what they thought to be the right answer to questions which were being asked indicated their knowledge that the witness did not know the right answer and they thereby prejudiced their case.

The case of *Baltimore and O. R. Company v. Chicago River,* cited by plaintiffs, deals with the problem of "indispensable party" and sheds no light on the right of a party, properly joined in an action, to waive his right to be present in Court.

The case of *Fillippon v. Albion Vein Slate Company,* 250 U. S. 76, involved a case where neither the parties *or their lawyer* were present at a critical stage of the action and therefore is not helpful in this case where there is no question but that plaintiffs' attorney was present during all of the trial. In the *Fillippon* case, which was a trial by jury of a negligence action, after the jury was instructed and retired, the jury sent the Judge a written inquiry which the Judge answered by giving them an in-

struction without counsel or the parties having a chance to object to the new instruction or to be present at the giving of it. The Court said at page 81:

> "Orderly conduct of trial by jury . . . entitled parties who attend for the purpose to be present in person *or by counsel* at all proceedings . . ." (Emphasis supplied.)

The Court said the new instruction should have been given either in the presence of counsel or after notice and an opportunity to be present.

In two of the other four cases cited by appellants the Court found no error and the other two cases do not involve factual situations analogous to the present action. In the instant case counsel were present for both plaintiffs at all times of the proceedings and at the times that plaintiffs were not present in the courtroom, counsel had consented to their remaining outside of the courtroom and thereby waived any right to be present.

In the case of *Willingham v. Willingham,* 15 S. E. 2d 514, cited by appellant, an action was filed by the mother to have a previous order, giving custody of children to the father, set aside, because during the trial the parties were excluded from the courtroom while the children, present at the instance of the Judge, were examined by the Judge.

The Court says at page 516:

> "Counsel for the mother was given the privilege and did examine them. It is true that parties as a general rule have the right to be present at all stages of the

trial (citing cases). Nevertheless in a proceeding of the present character, determinable by the Judge without the intervention of a jury, where the principal consideration is for the present and future welfare of the children, and which is not to be strictly governed by rules applicable in ordinary trials (citing cases) we do not think that it was beyond the discretion of the Judge to exclude both parties from the court-room while the children were testifying, where the attorneys representing the parties were allowed to remain, with the privilege of examining them. We cannot see how this could possibly have operated to the injury of either party."

In the case of *Freimann v. Gallmeier,* 63 N. E. 2d 150, a motion for new trial was made in an action of ejectment to recover possession of real property. It was assigned as error that the Court refused to grant appellant a continuance of the trial upon the verified motion of the defendant supported by the affidavit of her attending physician as to her inability to personally attend the trial. The Court said at page 153:

"A more serious question is presented by the ruling of the court in denying appellant's motion for a continuance based upon her physical illness and her inability to attend the trial of said cause, which is supported by the affidavit of her attending physician. Citation of authority is not required to sustain the proposition that a party to an action is entitled to be personally present in court when a trial is held in which he, or she, is a party of record. However, this rule is qualified by the further well-settled rule that a motion for a continuance is addressed to the sound discretion of the trial court, and that the court's action in denying an application for continuance does

not constitute reversible error, where the record affirmatively shows no abuse of such discretion or that a party litigant has not been deprived of any substantial right by the refusal of the trial court to grant a continuance. *Ruddick v. Hollowell,* 1919, 71 Ind. App. 442, 125 N. E. 82; *Louisville, etc., Traction Co. v. Montgomery,* 1917, 186 Ind. 384, 115 N. E. 673; *Sager v. Moltz,* 1923, 80 Ind. App. 122, 139 N. E. 687.

* * * * * * * *

". . . In view of the facts disclosed by the record in this case and the admissions heretofore quoted, we hold that the following provisions of the Indiana statutes are applicable, namely: §2-1071, Burns' 1933, §175, Baldwin's 1934, providing: 'The court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment can be reversed or affected by reason of such error or defect.'

"Also, §2-3231, Burns' 1933, §505, Baldwin's 1934, which reads in part as follows: '* * * nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below.'

"After a careful examination of the record, we are convinced that the merits of this cause were fairly tried and determined and that appellant has failed to establish that she has been deprived of any substantial right, or injured, by any ruling of the trial court of which complaint is now made."

In the case of *Ulmer v. Mackey,* 242 S. W. 2d 679, appellant, a defendant in a suit for damages for negligence

alleges as one of seven points of error in the District Court:

> "(4) refusing to permit appellant's absence to be explained of his whereabouts at the time of trial; . . . (6) permitting appellee to argue the absence of appellant as a presumption against him."

The headnote in the Appellate Court which reversed and remanded the cause, summarizes the case as follows:

> "A. E. Mackey brought action against Carl Joseph Ulmer for injuries sustained in automobile collision, wherein defendant filed cross-action. The District Court, Wichita County, Frank Ikard, J., overruled defendant's motion to stay, and entered judgment on verdict returned in favor of plaintiff, and defendant appealed. The Court of Civil Appeals, Hall, C. J., held that where defendant was in military service in Korea at time of trial, which prevented him from performing under automobile liability policy which required him to secure, give and obtain evidence and to assist in conduct of the trial, and jury could have construed defendant's absence as showing that he was insured, and money judgment was against defendant personally, refusal to grant motion for stay made on ground that absence would materially affect conduct of defense and prosecution of cross-action was abuse of discretion.
>
> "Judgment reversed and cause remanded with directions."

In the case of *Leonard's v. Dybas,* 31 A. 2d 496, the action was on a book account and for goods sold. Defendant appealed from a Judgment in favor of the plaintiff. The issues were submitted to a jury. During the course of their deliberations the jury requested further

instructions of the Judge and the Judge gave them instructions without submitting same to counsel. Appellant's counsel, although requesting to be present, was denied admittance during these proceedings. The Court said at page 497: "In the circumstances the action thus taken by the trial Judge constitutes reversible error in matters of law."

The distinction in the *Leonard* and *Ulmer* cases is apparent. Counsel there did *not* waive the right to be present during the additional instruction. In fact they requested to be present and were denied. In the instant case the facts are exactly the opposite.

II.

The Burden Is on Appellants to Prove Their Alleged United States Nationality and They Failed to Sustain That Burden.

Any person seeking to enter the United States as a citizen and national of this country must assume the burden of proof in establishing his nationality. The same burden rests upon a Chinese applicant for admission to the United States to prove that he is the son of an American citizen. This Court has so held in the following cases:

Jung Yem Loy v. Cahill, 81 F. 2d 809;

Wong Choy v. Haff, 83 F. 2d 983;

Wong Ying Leon v. Carr, 108 F. 2d 91.

The burden of proof required where the applicant files a petition for writ of habeas corpus, seeking a review of the Immigration and Naturalization Service Administrative Order of Deportation, is the same as in the present

action, the only difference being that in the present action there is a trial *de novo* by the District Court. The complaints of the plaintiffs allege citizenship, the answers deny citizenship, and on the pleadings alone the burden is on appellants.

The cases of *Siu Say v. Nagle* and *Wong Foo Gwong v. Carr, supra,* have been quoted under Point I of the Argument.

There are two other cases in which the court in habeas corpus petitions considered the use and value of discrepancy testimony and the court's remarks indicate that the proof offered by plaintiff fell short of the burden placed on the plaintiff when viewed in the light of the discrepancy testimony developed. In the case of *Wong Sun Ying v. Weedin,* 50 F. 2d 377, this court said, at page 378:

> In considering the weight of discrepancies, the psychological importance of their subject-matter to the witness should be estimated. If the subject is psychologically important and if it concerns the intimate family life, then a discrepancy with reference to it is inconsistent with the alleged relationship. This is the essence of the test used by this court in the case of Weedin v. Yee Wing Soon, 48 F. 2d 36, 37.
>
> * * * * * * * *
>
> Some of these discrepancies, taken alone, might only indicate the inaccuracy of human observation and the frailty of human memory, but when they are added to what may be called the "key" discrepancies their effect is cumulative to induce in the mind a belief that the parental relationship does not exist between the American citizen and the appellant.

In the case of *Weedin v. Yee Wing Soon,* 48 F. 2d 37, the court said, at page 37:

> The record shows a considerable number of discrepancies between the testimony of the appellee and two previously landed sons of Yee Kam. The appellee relies upon the proposition that the witnesses are in accord upon such a multitude of details concerning their home and village and family life as to convince any reasonable man of the truth of their testimony as to their relationship.
>
> * * * * * * * *
>
> In the case at bar, we have a multitude of agreements upon a great variety of details in the testimony which are quite consistent with the claimed relationship and point with great emphasis to the truth of the claim. On the other hand, we have a discrepancy that is difficult if not impossible to reconcile with the alleged relationship.

The discrepancy to which the court refers is that the father testified his mother died in his house, the house where the plaintiff claimed to have lived. The plaintiff's son testified that the grandmother, his alleged father's mother, died in the house of his brother. The court says: "It is difficult to see how there could be such a discrepancy between the testimony of the father and son if they were living together at the time of her death as they both testify," and concludes, on page 37, as follows:

> There are other discrepancies in the testimony which we will not pause to enumerate except to say that one related to ownership of rice land by the father and the cultivation thereof by the mother and son and showed disagreement which could hardly be expected if the claimed relationship did exist. In

view of these discrepancies it cannot be said that the proceedings before the immigration authorities were unfair. The order of the District Court releasing appellee is reversed, with directions to quash the writ of habeas corpus, and remand the appellee to the custody from whence he was taken.

On the question of the burden of proof, in *Ly Shew v. Acheson,* 110 Fed. Supp. 50, Judge Goodman says, at page 58: "The degree of proof therefore required of plaintiff should be of substantive parity with that required of petitioners for naturalization. . . . Where entry into the United States is sought upon the basis of the entrant's claim to United States citizenship, the rule is that the proof of alleged citizenship must be clear and convincing."

Lee Sin v. United States (C. C. A. 2), 218 Fed. 432;

Ex parte Chin Him, 227 Fed. 131.

A. The Trier of Facts May Refuse to Credit a Witness' Testimony Even Though That Testimony Is Not Contradicted.

Appellant argues (App. Br. 13) that "unimpeached and uncontradicted testimony cannot be disregarded." That is not the view expressed by this Court on January 12, 1954 in its Opinion in the case of *Mar Gong v. Brownell,* ..... F. 2d ....., where this Court said:

"This Court has had occasion recently to uphold the findings made by the trier of facts which refused to credit a witness' testimony even although that testimony is not contradicted. *National Labor Relations Board v. Howell Chevrolet Co.,* 204 F. 2d 79, 86, (Aff'd. *Howell Chevrolet Co. v. National Labor*

Relations Board, ... U. S. ....., December 14, 1953) (Citing other cases in a footnote). Upon the plaintiff's own theory, all of the witnesses who testified on his behalf are interested and when viewed in this light their mere say-so does not have to be accepted. *Flynn ex rel. Yee Suey v. Ward* (First Cir.), 104 F. 2d 900, 902; *Heath v. Helmick* (9 Cir.), 173 F. 2d 157, 161."

In the instant case the only persons who testified in addition to the two plaintiffs were their alleged father Tam Dock Lung, and alleged brother, Tam Hin Soon. There was no testimony offered by the mother, who is in China, or by any persons not a member of the family.

It is necessary to read the full transcript of the testimony in order to see the way the testimony developed. Many of the questions put by the Court indicate his growing disbelief in the testimony being proferred. As indicated in some of the testimony quoted in the argument under Point One *(supra),* at one stage of the trial the concern of the persons not on the witness stand, that is, the father and the other plaintiff, was such that they were attempting to signal to the plaintiff on the witness stand, the correct answer. That the Court did not believe the witnesses is indicated in the Findings [T. R. 13] and Conclusions [T. R. 14] and the Court's statement at the conclusion of the trial [T. R. 167].

The precise question in these cases is the *identity* of the plaintiffs as the alleged sons. Assuming for purposes of argument that the citizenship of the alleged father is admitted, and assuming that he may have had children in China, the precise question is whether or not the plaintiffs are those children or are they persons attempting to perpetrate a fraud on the Court.

Usually, as in this case, the files of the United States Immigration Service contain statements signed by the alleged father at the time of his return from the various trips to China, indicating the name, sex, and birth date, of children he claims were born in China. While these documents may be considered by the Court as evidence of the true facts, it is always possible, of course, that the alleged father reported the birth of non-existent children. However, even though the documents are taken as true, there is still the ultimate question, are the plaintiffs the sons or daughters the alleged father may have listed on the Immigration Service file. Knowing what the written files of the Immigration Service are going to show, the alleged father and the plaintiff usually do not testify in disagreement therewith. About all such evidence does is to present a basic framework upon which the Court can begin to try and discover where the truth actually lies.

In this case Exhibits 1 to 5, inclusive, are the statements signed by the alleged father for the Immigration Service on his return from his various trips to China. A short chronology indicating when the alleged father made the trips to China and the children he claimed were born, according to Exhibits 1 to 5, is helpful as a framework when reading the testimony. In short, the exhibits indicate the alleged father claims to have had six children, the Number One Son, who died, Number Two Son admitted to the United States in 1935, the Number Three and Number Four Sons, who are allegedly the plaintiffs herein, the Number Five Son, Tam Ching Ting, still in China, as to whom the father gave conflicting testimony and finally indicated he was a six months' child, and the Number Six child, a girl, Tam Mow Dang, still in China.

The chronology is as follows:

November 24, 1888 —Alleged father, Tam Dock Lung, born.

February, 1908 —Alleged father marries in China.

February 5, 1909 —No. 1 Son, Hom Hin Sick, born.

July, 1909 —Alleged father first comes to United States.

November 21, 1914 —Alleged father goes to China *first trip.*

October 11, 1915 —No. 2 Son, Tam Hin Soon, born.

November, 1915 —Alleged father returns to United States.

September 3, 1924 —Alleged father goes to China *second trip.*

October 4, 1925 —Plaintiff, Tam Chung Fay, No. 3 Son, born.

March 5, 1927 —Plaintiff, Tam Fay Hing, No. 4 Son, born.

June 2, 1927 —Alleged father returns to United States from China.

October 11, 1930 —Alleged father returns to China, *third trip.*

March 14, 1931 —No. 5 Son, Tam Ching Ting, born.

November 19, 1932 —No. 6 child, a girl, Tam Mow Dang, born.

October 30, 1933 —Father returns to United States from China.

October 27, 1935 —No. 2 Son admitted to United States.

B. The District Court Was Entitled to Disbelieve the Testimony of Tam Dock Lung, Alleged Father of Plaintiffs, Because of Conflicting Testimony About the Birth of His Fifth Son.

Exhibit 5 in evidence is the statement signed by Tam Dock Lung, the alleged father, in October, 1933, when he returned to the United States and gave the Immigration Service a list of his children. In that exhibit he lists Tam Jing Hing the No. 5 Son (sometimes spelled Ching Ting), as having been born on the Chinese date CR 20-5-26 which the interpreter translated as July 11, 1931. It would appear that a statement made two years later, in 1933, regarding the date of the birth of said son should have been correct.

However, in the testimony at the trial [T. R. 51 to 64, incl.] Tam Dock Lung testified that the fifth son was born on Chinese dates CR 20-1-26 which was translated to March 14, 1931 [T. R. 45]. He further testified [T. R. 43] that he left the United States for China October 11, 1930, or the date may have been September 12, 1930 [T. R. 58], and that he arrived in China on November 3, 1930 [T. R. 55, 61]. When, after a long colloquy and interruptions by opposing counsel and the Court, the question was finally asked the alleged father, "If you arrived in China, according to the English calendar, in October, how can you believe that the number 5 son was your son?", he answered [T. R. 63], "He was a six months' baby."

Later Tam Hin Soon, the No. 2 Son, heretofore admitted to the United States, testified [T. R. 71] that the fifth son was born May 13, 1931.

It is probable that the alleged father and the No. 2 Son discussed the factual matters about which they were

going to testify before coming to Court, and it was natural that they should have discussed the dates of births of the various children because it is common to ask questions regarding the dates of birth. So they may have agreed that the date was CR 20-1-26 or March 14, 1931. It is probable this date was erroneous but it was the one they had in mind.

The alleged father, when faced with Exhibit 5, the written statement to the Immigration authorities, and realizing that only six months had elapsed since he arrived in China before the date given for the birth of the son, showed no hesitancy in coming forward with the answer, "He was born a six months' baby." It is apparent the Court thought the father was merely inventing the most reasonable explanation he could think of at the moment, and a reading of the full testimony in the transcript from pages 51 to 64, inclusive, in the light of the knowledge that the father understands considerable English, as shown by the transcript, although an interpreter was used, sustains the belief that the father realized the predicament and came forward with the ready answer of the six months' son.

When the alleged father was recalled to the witness stand [T. R. 143] and asked if there was any other information he wanted to give, he then testified the correct date of birth was as in Exhibit 5, July, 1931, but still insisted it was a six months' baby.

Regardless of how the testimony is taken, it indicates a readiness on the part of the alleged father to tell an untruth in order to protect the record. If you assume that the son *was* a six months' son, or possibly that the child born was not really the child of Tam Dock Lung,

then it would appear that the alleged father gave a false statement regarding the birth of said child in October, 1933, when he furnished the statement to the Immigration Service on his return to the United States. If he would falsify then to make a record which appeared logical, regarding births of sons, the Court is entitled to disbelieve his testimony now.

Under Point II of Appellee's Brief it is contended that the District Court should not have considered the inconsistent statements of the alleged father regarding his fifth son, because the fifth son was not a party nor a witness. If it is relevant for the alleged father as a witness to testify regarding the whole family and if Exhibit 5, the statement to the Immigration Service in 1933 by the alleged father, when he returned from China, was admissible in evidence, certainly it was proper to impeach the father's statement in that document or to use it to impeach his testimony on the witness stand.

The father is put forward by the plaintiffs as their principal witness and they offer no other tangible evidence of any weight, such as family photographs, (Exhibit 6 was a photograph taken after the application to the State Department for admission into the United States and therefore of no weight as a historical or family document) or ancient letters or other family documents.

If the alleged father is to be allowed to take the witness stand and in effect limit his testimony to the statement "the plaintiffs are my sons" it is obvious that the Court could have no assurance that a fraud was not being perpetrated. It is for this reason that the courts, as indicated in the argument *supra,* have looked to testimony on collateral matters to sustain the plaintiff's burden.

C. Contradictory Testimony Regarding Necessity of a Pass to Leave Plaintiff's Native Village for Hong Kong and the Demeanor of Tam Fay Hing, Plaintiff, on the Witness Stand, Led the Court to Discredit Testimony for Plaintiffs.

The testimony of the second plaintiff, Tam Fay Hing, was never convincing in any respect. His answers were always evasive and not responsive. The Court was entitled to disbelieve his testimony even if there had been no impeachment or contradictions.

However, Tam Fay Hing contradicted the testimony of Tam Chung Fay and the alleged father, when he said [T. R. 135], "I don't remember having one" (a pass) and that it was not necessary to get permission from anyone to make the trip to HongKong [T. R. 137]. Later he corrected his testimony [T. R. 164, 165], that he remembered after he arrived in HongKong his brother had told him he had sent the passes back to their mother.

The father initiated the colloquy on this subject by his testimony [T. R. 118] when he stated in regard to a question why he did not bring the fifth son to the United States, that that son could not leave Canton while he was studying there because the "Communist regime doesn't allow him to leave," and later [T. R. 127] when asked how it was the third and fourth sons were able to leave the new village when the fifth son cannot leave Canton because of the Communists, the father said, "When they were in the village at that time they had a pass to get out of the village," and later he said, "They got permission and after the permission was granted the Communist government took back the slip, the permit, we call it."

The testimony of Tam Chung Fay regarding the pass is contained at transcript pages 129-130, 133, 134.

The testimony of Tam Fay Hing was given, while the alleged father and the other plaintiff sat next to the witness in the jury box, and is contained in the transcript [T. R. 134, 135, 136, 139, 140, 143, 146, 163]. It was during this testimony that the alleged father and the other plaintiff appeared to be trying to give the witness the answers by signals. This was noticed by the Court, as well as the attorneys in the courtroom.

The Court was entitled to believe that the witness, Tam Fay Hing, knew nothing about the situation with regard to whether or not the pass was necessary to get to HongKong, because he had never had that problem and, was not really the person he claimed to be. The fact that he gave other testimony not contradictory, can be attributed to the fact that it was about subjects which it might reasonably be anticipated he would be questioned. The subject of the pass was not anticipated.

There was one other subject about which the Court showed considerable interest in determining whether all of the witnesses testified alike, and that was the relation of the facts regarding the trip from the native village to Kong Moon to Macao to HongKong. The testimony of all of the witnesses regarding the time it takes to make this trip and the route taken is so confusing that it is almost impossible to follow.

Conclusion.

The Transcript of Record shows that the District Court gave the testimony of the witnesses of the plaintiff careful consideration, that every effort was made to allow the plaintiffs to explain discrepancies in testimony, and it is clear that the Court as the trier of the facts, reluctantly came to the conclusion that he did not believe the testimony of the witnesses and the plaintiff. The judgment for the defendant should be affirmed.

Respectfully submitted,

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No. 13975

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TAM DOCK LUNG, as Guardian *Ad Litem* for TAM CHUNG FAY and TAM FAY HING, and TAM CHUNG FAY and TAM FAY HING,

Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

BRIEF FOR APPELLANTS.

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Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

BRIEF FOR APPELLANTS.

Jurisdictional Statement.

The plaintiffs-appellants filed in the United States States District Court for the Southern District of California, Central Division, a petition seeking a declaratory judgment of United States citizenship. Such action was commenced in accordance with the provisions of Section 503 of the Nationality Act of 1940 (54 Stat. 1171, 8 U. S. C. A. 903).

The District Court denied plaintiffs' petition for a declaratory judgment [Tr. 15] and the plaintiffs appealed. [Tr. 17.] Jurisdiction of this Court to review the District Court's decision is conferred by 28 U. S. C. A. 1291 and 1292.

Statutes Involved.

Section 503 of the Nationality Act of 1940 (8 U. S. C. A. 903, 54 Stat. 1171), provides in so far as is pertinent, as follows:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States."

This statute has been repealed by the Immigration and Nationality Act of 1952 (8 U. S. C., Sec. 1101, *et seq.*)

which became effective December 24, 1952, but Section 405(a) of the latter Act continues the former statute in force and effect as to suits which were pending when the new Act became effective. (66 Stat. 280.)

The claim of right of the plaintiffs Tam Chung Fay and Tam Fay Hing within the meaning of the above section, and the denial of that right by the American Consulate General at Hong Kong, an official executive of the Department of State of which appellee is the head, and the allegation that this denies plaintiffs, and each of them, a right or privilege as a national of the United States, and other pertinent ultimate facts are pleaded in the complaint. [Tr. 3-8.]

Statement of the Case.

The action in this case was brought in the Court below under Section 503 of the Nationality Act of 1940 (8 U. S. C. A. 903) for the purpose of establishing the United States citizenship claim of both appellants herein. Each appellant claims to be a lawful blood child of Tam Dock Lung. The defendant-appellee admits that the said Tam Dock Lung, during all phases pertinent to the within action, was admitted to the United States as the son of a native of the United States. [Tr. 25.]

At the trial below it was stipulated that Tam Dock Lung (appellants' alleged father) first came to the United States in 1909, and that he made three trips thereafter to China. The first trip, he left the United States in 1914 and returned in 1915. The second trip, he left in

1924 from San Francisco and returned in 1927. The third trip, he left in October 11, 1930, and returned October 30, 1933. [Tr. 25-26.]

Tam Dock Lung (the alleged father of appellants) caused to be filed with the American Consulate General at Hong Kong, China, on or about the 13th day of June 1951, an application for the issuance of a United States passport or travel document in behalf of each of the appellants herein. That said applications were denied by the American Consulate General at Hong Kong, and following such denial to proceed to the United States, this suit was brought in the Court below. Appellants were then permitted to come forward to the United States, as provided in Section 503 of the Nationality Act of 1940, *supra,* for the sole purpose of prosecuting this suit.

In the course of the trial below it was stipulated that the eldest son of Tam Dock Lung, namely, Tam Hin Sik died in Shanghai in January, 1932, and counsel further stipulated that the second son, Tam Hin Soon, was theretofore admitted to the United States as the son of Tam Dock Lung. [Tr. 26-27.]

At the trial in the Court below both appellants, Tam Dock Lung and the second son, Tam Hin Soon, testified as witnesses for appellants. The appellee offered no evidence. At the conclusion of the testimony of plaintiffs and their witnesses and without any witnesses testifying for the defendant-appellee, the Court rendered a decision in favor of defendant-appellee. It was from this judgment that appellants appeal.

Statement of Points.

I.

The trial court erred in excluding Tam Chung Fay and Tam Fay Hing, the real parties in interest and the plaintiffs, from the court room during the entire trial and proceedings, except when they were witnesses.

II.

The trial court erred in considering alleged inconsistencies with reference to the fifth child of Tam Dock Lung, as he was not a party plaintiff or petitioner herein.

III.

The Court erred in not declaring the plaintiffs, Tam Chung Fay and Tam Fay Hing, as citizens of the United States, in view of the lack and failure of any evidence to the contrary adduced or introduced by the defendant.

ARGUMENT.

I.

The Trial Court in Excluding Both Plaintiffs Except When Testifying as Witnesses Committed Prejudicial Error.

At the commencement of the trial in the lower court both plaintiffs, Tam Chung Fay and Tam Fay Hing, were excluded by the Court. [Tr. 21-22.]

These plaintiffs were the real parties in interest (Rule 17(a), Federal Rules of Civil Procedure) and indispensable parties to the pleadings, and as a consequence should have been permitted to be present during all stages of the proceedings before the Court.

Rule 19(a) of the Federal Rules of Civil Procedure requires that persons having an interest in litigation shall be joined as parties to the action. Volume 2 of *Federal Practice and Procedure,* Section 512 at pages 58-62, in discussing Rule 19(a) states:

> "Indispensable parties are those who have such an interest in the subject matter that a final decree cannot be made without either affecting their interest or leaving the controversy in such condition that a final determination may be wholly inconsistent with equity and good conscience. The test of indispensability therefore is whether the absent person's interest in the controversy is such that no final judgment or decree can be entered which will do justice between the parties actually before the court, without injuriously affecting the rights of others not brought into the action."

There are many cases cited by the authors in which this rule is discussed and analyzed. It is respectfully submitted that as plaintiffs in this action were seeking permanent entry into the United States as the sons of Tam

Dock Lung, namely, to have the rights and privileges as citizens of the United States, these plaintiffs were "indispensable parties" within the meaning of Rule 19(a) and as a consequence had to be included in the pleadings, and certainly a "final decree" could not be made without affecting their interests. As indispensable parties they were certainly the *real parties in interest.*

As indispensable parties they therefore should have been present during all stages of the proceedings in the Court below. The case of *Baltimore & O. R. Co. v. Chicago River & I. R. Co.,* 170 F. 2d 654, cert. den., 69 S. Ct. 811, 336 U. S. 944, 93 L. Ed. 1101, in discussing indispensable parties held that an "indispensable party" is one whose interests in the subject matter of the suit and in the relief sought are so bound up with that of the other parties that his legal presence as a party to the proceeding is an absolute necessity *without which the Court cannot proceed.* The right of a party to be present at the trial is also discussed in Volume 53, *American Jurisprudence,* Section 24, page 42, Wherein it is stated:

> "A party to a civil action who is not in default is entitled to be present in the court room, and to be represented by counsel at all stages during the actual trial of the action."

Citing *Fillippon v. Albion Vein Slate Co.,* 250 U. S. 76, 63 L. Ed. 853, 39 S. Ct. 435; *Willingham v. Willingham,* 192 Ga. 405, 15 S. E. 2d 514; and *Preston v. Bowers,* 13 Ohio St. 1, 82 Am. Dec. 430. Volume 53, American Jurisprudence, further discusses the right of the plaintiff to be present in Section 34 at page 49, where they state, in part, as follows:

> "The trial of causes, *whether civil or criminal,* must be so conducted as to give the party litigants in civil actions or the accused in a criminal prosecution

> opportunity to be present and to be heard at every stage of the proceedings, . . ." (Emphasis ours.)

Other cases which hold that parties should be present during the trial of an action are: *Freimann v. Gaudmeier,* 63 N. E. 2d 150, 116 Ind. App. 170; *Ulmer v. Mackey,* 242 S. W. 2d 679. The case of *Leonard's of Plainfield v. Dyvos,* 31 A. 2d 496, 130 N. J. L. 135, holds that the right of party to be present is basic to "due process of law."

In applying these rules and the law as above indicated to the particular plaintiffs in this matter, their right to be present appears to be extremely significant in that they could not speak English and an interpreter was required for their testimony. [Tr. 22.] As they could not speak English they, of course, had no conception of the conversation between counsel and the Court when the Court excluded them from the trial. Therefore, of course, they had no opportunity to object or to state their feelings in the matter. As theirs was an action seeking the precious privilege of citizenship and as they could not converse in the English language, it is respectfully submitted the trial court should have exercised extreme care and caution toward them and given them an opportunity to choose whether they desired to be excluded, and the Court should have actually insisted that plaintiffs be present during all stages of the trial.

Thus, as the actual plaintiffs were real parties in interest, and indispensable parties within the meaning of Sections 17(a) and 19(a), Federal Rules of Civil Procedure, and as their language disability was readily apparent, it is submitted that the Court committed prejudicial error in excluding plaintiffs from the court room except when testifying as witnesses.

II.

The Trial Court Should Not Have Considered Alleged Inconsistencies Relative to the Fifth Son of Tam Dock Lung, Namely, Tam Jing Hing, as He was Not a Party nor a Witness Before the Trial Court.

The trial court in its findings of fact stated as follows:

"V.

The evidence adduced by each of said plaintiffs and their witnesses, Tam Dock Lung, alleged father; and Tam Hin Soon, alleged brother, contains so many discrepancies relating to subjects about which each and all of said persons and [16] witnesses should be in agreement, and the credibility of the testimony of each of said plaintiffs and of each of said witnesses has been so impeached that the Court does not believe the testimony of each of said plaintiffs or said witnesses and there is no credible evidence to support plaintiffs' claims that they are United States citizens." [Tr. 13.]

It is respectfully submitted that the trial court, with reference to the inconsistencies stated in paragraph V of the findings of fact, had in mind the testimony and alleged inconsistencies concerning the birth of the fifth child of Tam Dock Lung. [Tr. 71-73.] The reference to this fifth child appears to be purely a collateral matter and it is, of course, a well settled rule that a witness cannot be impeached on a collateral issue or matter. It was apparently admitted by all counsel that this fifth child was in no way involved in the matter either as a party or a witness and specifically was not one of the plaintiffs.

It is, therefore contended by appellants that the Court committed error in any way considering the alleged inconsistencies concerning the manner or type of birth of the fifth child with reference to the credibility of veracity of plaintiffs or their witnesses.

III.

The Court Should Have Declared Plaintiffs as Citizens of the United States as No Contrary Evidence or Testimony Was Presented by the Defendant-Appellee.

As heretofore set forth, it was stipulated in the trial below that the plaintiff, Tam Dock Lung, was admitted to the United States as the son of a native. [Tr. 25.]

Tam Dock Lung testified that he married Fung Shee March 1, 1908, in China. [Tr. 29-30.] This ceremony was recognized as a legal marriage in China. [Tr. 31-32.] Tam Dock Lung further testified that his first child was born February 5, 1909, in China. [Tr. 34.] To verify his wife and family, Tam Dock Lung identified a photograph, Plaintiffs' Exhibit 6. From this picture he identified his wife, his daughter, Mow Don, his alleged son Tam Chung Fay, a plaintiff in this action, and Tam Fay Hing, as a son, and the other plaintiff to this action. [Tr. 28-29.] Tam Dock Lung further testified that the second son was born October 11, 1915, and was named Tam Hin Soon. He further testified that when he returned to China in 1924 his second son was approximately ten years old and attending school [Tr. 39], and that he remained in China on this trip for approximately three years. [Tr. 39.] He testified that two children were born, the third child being named Tam Chung Fay, born October 4, 1925, and Tam Fay Hing, born March 5,

1927. These two are, of course, the plaintiffs in this action. [Tr. 40.] He further stated these two children were born to himself and his wife Fung Shee. [Tr. 40.] He further testified that when he left China for the United States in 1927, his wife and the plaintiffs herein were living in the same house in the same village [Tr. 42] and that when he again returned to China from the United States October 11, 1930, he returned to the same village that he had left and found his wife and children still residing in the same abode, and specifically identified the plaintiffs herein. [Tr. 43-44.] He further testified that when plaintiffs herein arrived in the United States he recognized them as his sons that he had seen in China. [Tr. 46.] He identified his son Tam Hin Soon [Tr. 48], and he identified the plaintiffs in this action, his third and fourth sons, as his sons, during the course of the trial. [Tr. 50.]

Counsel at the time of trial stipulated that the State Department denied the applications of plaintiffs herein for passports as American citizens on the ground that they were not American citizens. [Tr. 49.]

Tam Hin Soon who has been previously identified by Tam Dock Lung as his son, and by stipulation it had been agreed was admitted to the United States as the son of Tam Dock Lung, testified on behalf of plaintiffs herein. He testified that he lived in the same village as his father and that his mother's name was Fung Shee, and that he first saw his father when he was about ten years old. [Tr. 67.] He testified that while he was living with his mother and father two children were born to his mother, namely, Tam Chung Fay and Tam Fay Hing, plaintiffs herein. [Tr. 69.] This witness also

identified the family group in the photograph, being Plaintiffs' Exhibit 6. He specifically identified his mother and both plaintiffs herein. [Tr. 77.] He also specifically identified the plaintiffs herein, when they were admitted to the court room from the exclusion room for the purpose of identification, as his brothers and the sons of Tam Dock Lung. [Tr. 78.]

Plaintiff Tam Chung Fay testified that he was born in the same village as his brother, Tam Hin Soon, and his brother, the other plaintiff herein. [Tr. 80.] He testified that he recognized his mother and brother, the other plaintiff herein, from the photograph, Plaintiffs' Exhibit 6. [Tr. 83.] He identified his brother Tam Fay Hing, the other plaintiff herein, as his brother who was present in Court and walked in and out of the doorway with him from the exclusion room. [Tr. 91.]

The other plaintiff, Tam Fay Hing, testified that he was living at the village in China with his mother and his first, second and third brother and his younger sister, and that he recalls his father living with him in China. [Tr. 92.] This witness also identified his brother and mother from the photograph, being Plaintiffs' Exhibit 6. [Tr. 93.]

Thus, from the testimony of Tam Dock Lung, the alleged father, and his son, Tam Hin Soon (admittedly the son of Tam Dock Lung) and the plaintiffs themselves, it was clearly established that plaintiffs were the lawful blood children of Tam Dock Lung and that a legal marriage ceremony had taken place in China between himself and Fung Shee. No evidence or testimony in contradiction of this proposition was introduced by the defendant-appellee.

With reference to the alleged discrepancy from the finding of the Court [Tr. 13] it should be pointed out that although plaintiffs have the burden of proof in a suit for a judgment declaring themselves nationals of the United States, this type of burden does not raise a presumption that the plaintiffs or their witnesses will commit perjury. (*Lee Mon Hong v. McGranery* (1953), 110 Fed. Supp. 682.) As has heretofore been pointed out, the testimony of the plaintiffs and their witnesses was entirely uncontradicted and unimpeached and the defendant-appellee offered no evidence. It is submitted that unimpeached and uncontradicted testimony cannot be disregarded.

> *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U. S. 209, 216-217, 51 S. Ct. 453, 75 L. Ed. 983, 987-988;
>
> *Grace Bros. v. Commissioner of Internal Revenue* (C. A. 9), 173 F. 2d 170, 174;
>
> *San Francisco Assn. for the Blind v. Industrial Aid for the Blind, Inc.* (C. A. 8), 152 F. 2d 532, 536.

In *Foran et al. v. Commissioner of Internal Revenue* (C. A. 5), 165 F. 2d 1705, wherein the only evidence before the trial court was the testimony of one of the parties the Appellate Court said:

> "We think the court's refusal to follow the sworn testimony is contrary to law, and requires the setting aside of its fact-finding as it would that of a jury."

A reading of the entire testimony of plaintiffs and their witnesses leaves not the slightest room for doubt that their relationship was fully established and that the appellants are citizens of the United States.

In *Johnson v. Damon* (C. C. A.), 16 F. 2d 65, the Court considered alleged discrepancies on which an excluding decision was based, and in reference to the excluding decisions said:

> "The mind revolts against such methods of dealing with vital human rights."

This language might well be applied in the instant case.

In the case of *Gung You v. Nagle,* 34 F. 2d 848, 852, the Court stated:

> "Relationship is not usually proved by physical facts, and never is where the mother does not testify, but by pedigree reputation in the family, and by the conduct by the party, including the manner in which they live. The fact that a small child lives in the home of its alleged parents and that they maintain toward each other the obligations involved in the relationship is evidence favorable to the issue, and evidence that they did not live together and did not conduct themselves as parents and child is evidence to the contrary, and further:
>
> "Such evidence is not collateral evidence; it is direct and material evidence on the issue."

The testimony of the plaintiffs, their alleged father and brother clearly established a relationship of parent and child, and they all lived together in the same home and the same village. No evidence was introduced to the contrary. Thus such testimony should have been considered by the trial court as "direct and material evidence on the issue."

See also:

Quan Toon Jung v. Bonham (C. A. 9), 119 F. 2d 915;

Wong Tsick Wye et al. v. Nagle (C. A. 9), 33 F. 2d 226.

The positive, uncontradicted and unimpeached testimony given by the plaintiffs was supported by their alleged father and brother, both of whom the defendant and appellee admits are properly in the United States. Their testimony was further corroborated by the fact that the immigration records over a period of many years show the genealogy and citizenship of the putative father by records of his trips from the United States to China and back, and further show that the brother was heretofore admitted as the citizen son of Tam Dock Lung, all of this is buttressed by a family photograph taken in China showing the plaintiffs with their alleged mother.

Conclusion.

It is respectfully submitted that the trial court committed error in excluding the plaintiffs, being the persons attempting to establish citizenship, from the trial of the matter in the lower court, and that plaintiffs established by clear and convincing evidence and testimony their relationship to Tam Dock Lung sufficient to be declared as citizens or nationals of the United States, and that as a consequence the judgment of the lower court should be reversed and appellants each declared United States citizens and/or nationals.

Dated, Los Angeles, California, December 30, 1953.

WILLIAM E. CORNELL,

Attorney for Appellants.

No. 13977

United States
COURT OF APPEALS
for the Ninth Circuit

YOSHIO MURAKAMI,

Appellant,

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE,

Appellee.

On Appeal from Judgment of the Circuit Court of the United States for the District of Oregon.

BRIEF FOR APPELLEE

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YOSHIO MURAKAMI,

Appellant,

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE,

Appellee.

On Appeal from Judgment of the Circuit Court of the United States for the District of Oregon.

BRIEF FOR APPELLEE[1]

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

This is an appeal from an order and judgment (R 79-80) entered on June 18, 1953, by the United States District Court for the District of Oregon, dismissing the plaintiff's complaint. The plaintiff sought a decree adjudging that he is a citizen of the United States and as such entitled to rights and privileges of a national of the United States, including a passport in order to re-

[1]Except where reference is made to the briefs filed by the parties the appellee, defendant below, is herein called defendant; the appellant is called plaintiff.

turn to the United States. The issue presented by the pleadings was whether or not the renunciation of United States nationality accomplished by the plaintiff pursuant to the provisions of former Title 8 USC 801(i)[2] (now Title 8 USCA Section 1481(a)(7)), was the result of coercion and not his free and voluntary act.

The complaint (R. 2) in the instant case[3] was filed on August 10, 1951, pursuant to Section 503 of the

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[2]Sec. 801. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

"(i) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense: * * *." 54 Stat. 1168, as amended by Act of July 1, 1944, 58 Stat. 677, 8 U.S.C.A. §801(i). The Act of July 1, 1944, added subsection (i).

[3]On August 23, 1948, plaintiff was joined as a party-plaintiff in the case of *Abo et al. v. Clark et al.*, 77 F. Supp. 806, wherein he and some 4,315 other persons sought to have set aside their renunciations of citizenship. (This case was considered by this Court on appeal. *McGrath v. Abo et al.*, 186 F. 2d 766). On November 6, 1951, plaintiff *Yoshio Murakami* filed a document entitled "Dismissal" with the District Court for the Northern District of California wherein he stated he substituted himself in pro per instead of Wayne M. Collins and dismissed the cause of action on his behalf in that case. The plaintiff, *Yoshio Murakami,* in the *Abo* case was included in Group V of the Designation of Plaintiffs set forth in Appendix A of the Government's Brief on Appeal in the *Abo* case. These various groups, some 20 in number, were included in the Defendant's Offer of Proof made to the District Court in the *Abo* case, the rejection of which proof this Court held to be in error. *McGrath v. Abo, supra.*

Nationality Act of 1940 as amended (former 8 USC 903; repealed by the Immigration and Nationality Act of June 27, 1952, §403) and alleged that plaintiff was born in Seattle, Washington, on March 9, 1920, and claimed his permanent residence to be Portland, Oregon (R. 2). Jurisdiction of the District Court was alleged, in Paragraph III of the Complaint, to lie in Title 8 USC Sec. 903. It was further alleged that while plaintiff was detained at the Tule Lake Relocation Center, subsequent to his evacuation, he renounced his United States citizenship in 1945, as a result of coercion and thereafter on December 29, 1945, left the United States for Japan (R. 3). The allegation is also made that the plaintiff applied for a passport at the Office of the United States Consul at Tokyo, Japan, for the purpose of returning to the United States as a citizen thereof but that said Consul denied the application on the ground that the plaintiff had lost his United States citizenship (R. 3). The Answer of the Defendant admitted the conclusion of law as to jurisdiction set forth in Paragraph III of the Complaint and further admitted the allegation of the plaintiff's application for passport and its denial by the United States Consul on the ground that plaintiff had lost his citizenship by virtue of his renunciation (R. 5). The allegation by plaintiff that his renunciation of United States citizenship was the result of coercion and not his free and voluntary act was expressedly denied, as was the fact that Japan was plaintiff's temporary residence (R. 5). By pre-trial order both parties admitted that the plaintiff on January 3, 1950 made an application to the American Vice-Consul at Yokohama

for passport to the United States as an American citizen and that said application was denied on the grounds that plaintiff had renounced his American citizenship while at the Tule Lake Relocation Center (R. 7, 22).

The District Court denied the plaintiff's application for a voluntary dismissal without prejudice filed pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure (R. 68) and filed its opinion on June 3, 1953 (R. 69-70). On June 18, 1953, the District Court filed its Findings of Fact and Conclusions of Law (R. 71-78) and entered its Order and Judgment, dismissing the complaint and ordered the plaintiff, in accordance with the provisions of Title 8 U.S.C. Sec. 903, be returned to Japan (R. 79-80).

The jurisdiction of the District Court rests upon the provisions of Section 503 of the Nationality Act of 1940 as amended (Title 8 USC 903).[4] This Court has juris-

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[4]Sec. 503. "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence, for a judgment declaring him to be a national of the United States." * * *

diction to review the judgment of the District Court under Title 28 United States Code, Section 1291.

QUESTIONS INVOLVED

1. Whether the Court below committed reversible error in finding that the plaintiff did not sustain the burden of proving that his renunciation of United States citizenship was coerced and involuntary.
2. Whether the Court below abused its discretion in refusing to grant plaintiff's motion for voluntary dismissal made pursuant to Rule 41(a)(2), Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

I.

Undisputed Facts

As stated in Appellant's Brief, the facts as to the general conditions existing at Tule Lake Relocation Center are for the most part not in dispute, most of them having been admitted in the pre-trial order (R. 7-22). The admissions as to such general conditions in the pre-trial order are substantially the same as those in the findings in the case of *Acheson v. Murakami,* 9 Cir. 176 F. 2d 953, 960. The general concurrence with and implementation of that decision by the Attorney General and the Department of State is known to this Court and is fully set forth in the Government's Brief filed in the *Abo* case, *supra,* and will not be repeated here.

Additionally the following facts appear to be undisputed. The plaintiff whose parents were born in Japan and subsequently immigrated to the United States, was born in Seattle, Washington, March 9, 1920 (R. 7).

When he was a few months old his parents returned to Japan taking plaintiff with them, where he continuously resided until December 1939. While resident in Japan the plaintiff attended Japanese public schools beginning at the age of seven in April 1927 and continuing to March 1935 (R. 8). He returned to the United States arriving at San Francisco, California, on or about January 2, 1940 (R. 7, 8). From January 1940 to March 1942 the plaintiff resided at San Lorenzo, California, and in May 1942 he was evacuated to the Salinas Assembly Center in Salinas, California, pursuant to Civil Exclusion Orders issued to all persons of Japanese ancestry who were resident of prescribed military areas (R. 8). On July 5, 1942, the plaintiff was evacuated from Salinas, California, to the Poston Relocation Center in Poston, Arizona, where he remained until October, 1943, at which time he was transferred to the Tule Lake Relocation Center at Newell, California (R. 8).

On December 20, 1944, the plaintiff by letter addressed to the Department of Justice requested that there be sent to him all forms necessary to renounce his citizenship (R. 33, Plaintiff's Contention No. 43). Thereafter on February 15, 1945, the plaintiff was afforded a hearing on his renunciation of citizenship before a hearing officer duly designated by the Attorney General, at which he executed and tendered to the hearing officer a formal written renunciation of nationality with a request for the Attorney General's approval thereof (R. 33-34, 41, Plaintiff's Contention Nos. 45 and 46). The aforesaid hearing officer on February 15, 1945 recommended approval of plaintiff's request for renunciation (R. 34,

42, Plaintiff's Contention No. 47). The Attorney General, on April 26, 1945, approved the plaintiff's renunciation of United States nationality as not contrary to the interest of national defense and notified the plaintiff of such approval (R. 34, 42, Plaintiff's Contention No. 48). On December 29, 1945, the plaintiff voluntarily sailed for Japan on the S.S. General Gordon (R. 22). On January 3, 1950, the plaintiff made application to the American Vice-Consul at Yokohama, Japan, for a passport to return to the United States as an American citizen and such application was denied on the grounds that plaintiff had renounced his American citizenship at the Tule Lake Relocation Center (R. 22). A Certificate of Identity was issued to this plaintiff on December 10, 1951 for the purpose of appearing in the instant action upon the condition that he shall be subject to deportation in case it shall be decided that he is not a national of the United States. He arrived in the United States in January of 1952.

II.

The Proceedings Below and the Effect of Prior Litigation Thereon

This Court, in the case of *McGrath, et al. v. Abo, et al., supra,* had before it the question of the validity of the renunciations of United States Nationality by some 4,315 native-born persons of Japanese ancestry, including the present plaintiff. Because of the oppressiveness of the general conditions prevailing at the Tule Lake

Relocation Center, set forth fully in its findings in *Acheson v. Murakami, supra,* this Court held in the *Abo* case that a rebuttable presumption arose, as to those renunciants confined at Tule Lake, that their actions of renunciations were involuntary, requiring the defendants to go forward with evidence to rebut the presumption. However, when such evidence is introduced the presumption disappears but the fact of the coercive conditions remains as a part of a plaintiff's showing to support his individual burden of proof (P. 773). In the *Abo* case, *supra,* the defendant designated and classified all of the plaintiffs into twenty different groups with respect to the evidence that would be offered to show the voluntary character of the renunciations. A description of the various offers of documentary proof relative to each of the twenty groups with the number of persons in each group is set forth in *Appendix "A" infra.* In *Abo,* it was unequivocally held that "the proposed evidence as to each group, save one group of 58 plaintiffs [as to whom the offer of proof was solely that they went to Tule Lake to be with family members,] *would overcome the presumption of coercion* (P. 774). (Emphasis supplied) .This Court held that the District Court erred in rejecting such evidence and, therefore, reserved the judgment as to most of such plaintiffs (including the instant plaintiff). Since plaintiff here renounced his citizenship at Tule Lake it is clear that the principles enunciated in the *Abo* case were at least applicable to (if not res adjudicata in) the proceedings below. It will be hereinafter shown, that they were substantially applied by the District Court and counsel for the parties to this cause.

Subsequent to the filing of the complaint and answer this cause came on for pre-trial on January 15, 1952, at which time plaintiff and defendant exhibited their documentary evdence. The pre-trial order was entered on January 19, 1952 (R. 56), and on January 31, 1952 the defendant filed its objections to plaintiff's pre-trial exhibits Nos. 2 through 9, in so far as they stated conclusions and opinions (R. 57). The plaintiff filed objections to certain pre-trial exhibits of the defendant (R. 59). Although the District Court did not rule on the admissibility of such exhibits at the pre-trial conference nevertheless they were exhibited to the Court prior to the taking of plaintiff's testimony and were subsequently admitted into evidence thereby fulfilling the defendant's requirements to go forward with the evidence as required by *Abo, supra.*

Appellant in his brief (P. 18) asserts that the defendant failed to produce evidence rebutting the presumption and seems to assert that he failed to produce any evidence to meet his burden of going forward with the evidence (P. 18). We believe this assertion to be erroneous for the following reasons. The District Court admitted familiarity with *McGrath v. Abo, supra,* with its requirement that the defendant offer documentary evidence in order to assume his burden of going forward with the evidence (R. 197-198). It would be presumptuous to assume that the District Court would prevent the defendant from offering evidence, as to which this Court in the *Abo* case stated he not only had the right, but the duty to do, as part of his case. Counsel for the defendant on five separate occasions offered in evidence

the Defendant's Pre-trial Exhibits (R. 172, 186, 193, 195 and 197). In commenting upon the Defendant's Pre-trial Exhibits Nos. 21 through 29, to some of which the plaintiff had made objection (R. 59) the District Court said as follows:

> "Again I am inclined to think they are admissible, but in view of the situation since I am going to take the whole thing under advisement, I shall be glad to rule upon them at the time, and if they are not entitled to admission I shall of course exclude them." (R. 196, 197)

That the trial court admitted the same in evidence is conclusively demonstrated by reference to its Order and Judgment entered on June 18, 1953 (R. 79-80), which Order states in pertinent part as follows:

> "Thereafter and on the 20th day of November, 1952, trial in the within cause was resumed, at which time documentary evidence was introduced; thereupon the Court took the within cause under submission and having considered oral testimony and documentary evidence adduced at the trial, and the court being advised in the premises and having made its findings and conclusions of law * * *"

The defendant offered the documentary evidence in order to show that the plaintiff received his education and formal schooling in Japan, refused to swear allegiance to the United States, applied for expatriation prior to his renunciation of citizenship, applied for expatriation subsequent to his renunciation of citizenship and voluntarily returned to Japan. This evidence is encompassed in the various offers of proof made by the defendant in the *Abo* case, *supra* (See Appendix "A" *infra*) as to which this Court stated that such evidence

would overcome the presumption of coercion. Such a holding makes such evidence material, relevant and competent, thus disposing of plaintiff's objections thereto.

The appellant, in footnote 9 at Page 18 of his brief, in addition to asserting that it cannot be determined from the record whether the court considered the documents as evidence, asserts that if the court did consider the documents offered by the defendant as evidence, the propriety of its so doing without a ruling as to their admissibility is open to serious question. Whatever technical niceties are involved in this point it is submitted that the error, if any, of the District Court, in failing to rule on the epecific objections of the plaintiff is harmless error, in view of the *Abo* case *supra,* and should be disregarded by this Court (Title 28, USC 2111, *Cf.* Rule 61 Federal Rules of Civil Procedure; *Barie v. Superior Tanning Co.,* 7 Cir., 182 F. 2d 724, 728. Indeed, if the District Court had excluded the documents it would now be our position that such exclusion would have been in the teeth of the mandate of this Court ordering their admission. Surely this plaintiff could not overcome this Court's decision in his case merely by dismissing the cause he had pending in one District Court, and by filing it in another within this same Judicial Circuit.

The trial of the issues without a jury began on January 19, 1952 (R. 93-189) and thereafter was resumed on November 20, 1952 (R. 189-199) at which time plaintiff filed an application for voluntary dismissal without prejudice to Rule 41(a)(2) of the Federal Rules of Civil Procedure (R. 61). The motion was denied (R. 68) and the trial of the cause was resumed (R. 189).

III.

Plaintiff's Testimony

A resume of the testimony of the plaintiff viewed in its most favorable light and offered in support of his allegations that his act of renunciation was coercion is as follows. He returned to the United States from Japan in 1940 for the reason that if he stayed in Japan another year he would be subject to draft by the Japanese Army and this he did not desire to do since he was an American (R. 120). In May of 1942 he was evacuated to an assembly center and this caused him to feel he was not wanted and that the United States did not need him (R. 107, 108). This feeling was further fostered by the experience of having a friend of his of Japanese ancestry, discharged from the United States Army, telling him that the Army did not need any Japanese in the United States Army (R. 109. He also stated that the statement of General DeWitt that "A Jap is a Jap and it don't make any difference if they have citizenship or not" also made him feel that he was not wanted in the United States (R. 110). At Tule Lake Relocation Center he found himself in a dirty, dusty encampment, surrounded by barbed wire and guarded by soldiers (R. 110), and he lived in cramped quarters with five other persons in the same room (R. 111).

While at the Tule Lake Center he heard of the Hoshi-dan and the Seinen-dan organizations (Pro-Japanese Organizations) beating people up and rumors that the persons so beaten were people who were against

the Japanese Government (R. 112). He also heard of a killing of a Mr. Hitome at the Camp and that it had been accomplished by the Hoshi-dan. When asked directly why he renounced his citizenship he stated he did so because he felt if he did not he would get beaten up like Hitome's brother and three others and killed like Hitome (R. 113). Four or five of his roommates were members of the Hoshi-dan and three of them told him he would be beaten up if he did not renounce his citizenship (R. 115), and they demanded that he renounce his citizenship because "they were not wanted in this country." (R. 116). He also testified that his roommates told him the questions that would be asked at the renunciation hearing and the answers that he should give and that if he did not give these answers he would be beaten up (R. 116). He heard a rmuor from his roommates that he was going to be sent back to Japan at the end of the War and if he did not show any loyalty to Japan he would be treated badly upon his arrival in Japan (R. 117). Finally he testified that at the beginning of 1945 he knew some people who went back to the Pacific Coast and he haird in discussions at the Tule Lake Camp that some of these people were beaten up and could not find a job (R. 118) and these rumors made him afraid to go out of camp (R. 119).

The foregoing testimony of the plaintiff, without reference to subsequent cross-examination, or evaluation in the light o fthe documentary evidence produced by the defendant, hereinafter discussed, constituted the effort of the plaintiff to carry his burden of proving that his renunciation was coerced and this because, as here-

inbefore stated, the presumption of coercion that his act of renunciation was involuntary was rebutted by the documentary evidence exhibited by the defendant in assuming his burden of going forward with the evidence.

SUMMARY OF ARGUMENT

I. The finding of the District Court that the plaintiff did not sustain his burden of proving that his renunciation of citizenship was duressed, is supported by substantial evidence, is not clearly erroneous, and accordingly, should not be set aside, *Rule 52(a), Federal Rules of Civil Procedure.* The documentary evidence introduced by the defendant sustained his burden of going forward with the evidence to refute the presumption of coercion accorded to plaintiff and was clearly relevant and material under the prior ruling of this Court in *McGrath et al. v. Abo, et al., supra.* Such evidence clearly indicates that the plaintiff, a Kibei, who lived the greater part of his minority in Japan, was loyal in his attitudes toward Japan and disloyal to the United States. His renunciation of citizenship was merely another link in the chain of his disloyalty to the United States and the Court below having the opportunity to observe his demeanor, particularly on cross-examination, and to judge his credibility, was justified in giving little or no weight to his uncorroborated self-serving testimony relative to threats of bodily harm made to him by members of pro-Japanese organizations at the Tule Lake Relocation Center which allegedly caused him to renounce his citizenship. The fact that

the defendant did not introduce any evidence directly contradicting the plaintiff's assertions of coercion does not militate against the finding of the court below that he failed in his burden of proof. *National Labor Relations Board v. Howell Chevrolet Co.,* 9 Cir., 204 F. 2d 79, 86 (affirmed *Howell Chevrolet Co. v. Labor Board,* 74 S. Ct. 214). Plaintiff is not entitled as a matter of law to a reversal of the judgment below on the strength of *Acheson v. Murakami, supra.* This is so because nothing in *Murakami, supra,* is *res adjudicata* on the question of whether the renunciation of this plaintiff or any other renunciant was coerced. Each renunciant has his own individual burden of proof. Duress is personal and the case of each renunciant must stand upon its own bottom. *Mar Gong v. Brownell,* 9 Cir., No. 13,787, decided January 12, 1954; *McGrath, et al. v. Abo, et al., supra.*

II. The trial court did not abuse its discretion in denying the plaintiff's motion to voluntarily dismiss this action under Rule 41(a)(2) of the *Federal Rules of Civil Procedure.* The great weight of authority is that the granting or denial of a voluntary dismissal without prejudice under Rule 41(a)(2) is a matter of judicial discretion the exercise of which will not be disturbed on appeal in the absence of clear abuse. *Moore, et al. v. C. R. Anthony Co.,* 10 Cir., 198 F. 2d 607, 608; *United States v. Pacific Fruit and Produce Co.,* 9 Cir., 138 F. 2d 367; *Ockert v. Union Barge Line Corp.,* 3 Cir., 190 F. 2d. 303, 304. Plaintiff's basis for his motion to dismiss was essentially, that being a lay-person, he needed the assistance of counsel to execute and submit to the De-

partment of State an affidavit setting forth the circumstances of and reasons for his renunciation of citizenship in order that he might be documented by the Department of State as an American citizen. Further, that in the absence of a showing of prejudice to the defendant he was entitled, as an absolute right, to dismiss this cause, the same being restricted only by the requirement that it be done upon such terms and conditions as the court deems proper. We submit these reasons are not persuasive since there is no showing that plaintiff could make any better showing of his case by submission of affidavits to the Department of State than if he testified fully on the matter at the trial of his case where he was represented by counsel. The plaintiff was admitted to this country on a certificate of identity for the express purpose of testifying at his trial, subject to deportation if he failed to establish his claim of American citizenship. The granting of his motion to dismiss would clearly abort his pending suit, which action was the only reason for his being in the United States. Under these circumstances the refusal of the court below to grant his motion was not an abuse of its discretion.

ARGUMENT

I.

The Ultimate Finding of the District Court That the Plaintiff Did Not Sustain His Burden of Proving That His Renunciation of United States Citizenship Was Involuntary Together With the Subordinate Findings of Fact Are Supported by the Evidence and Are Not Clearly Erroneous.

The District Court made twenty-five findings of fact which, with the exception of Finding No. 23, were either supported by facts agreed to by the parties in the pretrial order or were otherwise admitted by the plaintiff. Support for this assertion will be found in Appendix "B", *infra,* where there are set forth in tabular form the specific findings of fact and the record reference to evidence supporting such findings of fact.

The nub of this case is to be found in the aforementioned Finding of Fact No. 23 which states:

> "23. Plaintiff contends that during the time that he resided at Tule Lake Relocation Center there prevailed an atmosphere of intimidation, coercion, undue influence and duress, influencing him and others to renounce their United States citizenship. On this issue, plaintiff had the burden of proof and I find that plaintiff has not sustained this burden and that any such conduct if any in fact existed, did not influence plaintiff's free will, choice or desire to renounce his citizenship, and on the contrary, it is obvious that the Courts so finds that plaintiff's loyalty during all times herein involved was all to Japan and still is." (R. 76).

Having made this finding the Court in its conclusions of law stated as follows:

> "2. Plaintiff's contentions and *testimony* that he acted under force, fear, coercion and intimidation of Japanese aliens, and further that he felt the Government and the Army were no longer interested in having him as a citizen, are insufficient reasons to vacate plaintiff's renunciation of his citizenship and to restore to him the privilege of a national or citizen of the United States of America." (Emphasis supplied). (R. 77).

A reading of the quoted finding and conclusion of law clearly indicates that the District Court was of the opinion that the uncorroborated testimony of the plaintiff that he renounced his citizenship because he was afraid that if he did not, he would be physically assaulted by members of pro-Japanese organizations including three of his roommates, and that he felt that the United States Government and the Army were no longer interested in having him as a citizen were, in the light of all the evidence, insufficient reasons *insofar as this plaintiff was concerned.*

We submit that there is nothing in the findings of fact or conclusions of law which justifies the conclusion, that the District Court, in making its ultimate finding that plaintiff was not coerced into renouncing his citizenship, did not consider the coercive conditions existing at Tule Lake to be a part of plaintiff's case. We believe that a fair reading of the evidence indicates that the District Court in finding and concluding that the plaintiff's renunciation was not voluntary considered the documentary evidence introduced by the defendant, as

proof of plaintiff's loyalty to Japan and conversely disloyalty to the United States, and concluded from this and other evidence that the plaintiff, being so disposed, did not prove a coerced renunciation by asserting coercive action of persons, presumably equally loyal to Japan.

A.

ANALYSIS OF DEFENDANT'S DOCUMENTARY EVIDENCE AND PLAINTIFF'S TESTIMONY

This plaintiff, a Kibei[5] on February 19, 1943, while at the Poston Relocation Center executed a form entitled "Statement of United States Citizen of Japanese Ancestry" (Defendant's Pre-trial Exhibit No. 21(b)), wherein he stated in pertinent part, that to the best of his knowledge his birth was registered with a Japanese Governmental agency for the purpose of establishing a claim to Japanese citizenship and that he never applied for cancellation of such registration. In answer to Question 27 contained in this Statement, as to whether he was willing to serve in the Armed Forces of the United States on combat duty wherever ordered, the plaintiff answered in the negative. Question 28 of the aforementioned statement was as follows:

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[5]It will be remembered that plaintiff when a few months old was taken to Japan by his parents where he was educated and did not return to the United States until he was 20 years of age. That this is not without significance, is demonstrated by the decisions of this Court in the *Murakami* and *Abo* cases, where the Court characterizes many of such persons as "permanently pro-Japanese."

> "Will you swear unqualified allegience to the United States of America and faithfully defend the United States from any or all attack by foreign or domestic forces, and forswear any form of allegience or obedience to the Japanese Emperor, or any other foreign Government, power, or organization?"

To this question, Murakami, answered as follows: "No, not at present time." (Defendant's Pre-trial Exhibit No. 21(b); DSS Form 304(A)). On the same date, namely, February 19, 1943, the plaintiff indicated to War Relocation Authority Personnel, that he did not desire any employment and that he would not take employment in any part of the United States (Defendant's pre-trial Exhibit No. 21(a); Form WRA 126(a)). On August 7, 1943, while still at Poston Relocation Center the plaintiff indicated to a Review Board for Segregation that his answer to Question 28 in Form DSS 304(A) was still "No", that the question was clear and that he wanted to go with his friends (Defendant's Pretrial Exhibit No. 21(c); Form WRA 277). On June 11, 1944, while at the Tule Lake Relocation Center the plaintiff executed and filed with the WRA a form entitled "Individual Request for Repatriation or Expatriation". He certified that the request was filed voluntarily (Defendant's Pre-trial Exhibit No. 21(d)). On December 20, 1944, the plaintiff executed and forwarded a letter to the Department of Justice in which he requested that there be sent to him all forms necessary to renounce his citizenship (Defendant's Pre-trial Exhibit No. 22(a)). Prior to February 15, 1945, plaintiff executed and forwarded to the Attorney General a form entitled "Application for Permission to Renounce United

States Nationality" (Defendant's Pre-trial Exhibit No. 22(c)).

On February 15, 1945, he was given a hearing on his renunciation of citizenship by a hearing officer at which there was an interpreter. A transcript of the minutes of the hearing on his renunciation of citizenship indicates that the plaintiff stated that he applied to renounce his citizenship; that the signature on the application form to renounce his citizenship was his own and that he signed it of his own free will. He stated that he wanted to give up his citizenship because his parents and a brother were in Japan and he had to go back to Japan since it was his duty to go to Japan and do whatever he could as a Japanese citizen; that he was loyal to Japan and believed in the divinity of the Emperor (Defendant's Pre-trial Exhibit No. 22(b)). On the same date he executed the formal document of renunciation of United States nationality which was approved by the Attorney General as not contrary to the interests of national defense (Defendant's Pre-trial Exhibit No. 23(a)).

By letter dated October 1, 1945 (subsequent to the termination of hostilities with Japan) the plaintiff attempted to withdraw and revoke his renunciation claiming that his renunciation was duressed and that he was intimidated and compelled to sign the renunciation form by threats of physical violence to himself (Defendant's Pre-trial Exhibit No. 24(a)). On October 27, 1945 the plaintiff executed a form entitled "Application for Repatriation" in which he stated that he desired to be repatriated to Japan unconditionally and without quali-

fication for the reason that his brother was serving in the Japanese Navy and should his brother not return from action it was his duty to look after his parents as he had no other brother or sister in Japan (Defendant's Pre-trial Exhibit No. 23(b); Form I-540, Immigration and Naturalization Service). On November 21, 1945, the Department of Justice in response to plaintiff's letter of October 1, 1945, advised him that revocation of his renunciation was not possible (Defendant's Pre-trial Exhibit No. 24(b)). On December 14, 1945, the plaintiff executed an application to go to Japan to live (Defendant's Pre-trial Exhibit No. 28).

With this evidence, the trial court weighed the plaintiff's testimony as to threats of violence if he did not renounce, clandestinely made insofar as this record reveals, and found such uncorroborated testimony insufficient to carry his burden of proving a coerced renunciation.

The appellant asserts at Pages 20-23 of his brief that the District Court erred because its ultimate finding was based solely on a consideration "that plaintiff's loyalty during all times herein involved was all to Japan and still is." Having adopted this premise of irrelevancy, appellant concludes that the Court excluded from consideration, the question of whether or not the renunciation was involuntary. We submit that the District Court's reference to the loyalty of the plaintiff to Japan, based upon documentary evidence introduced by the defendant, is not irrelevant or immaterial to the question of whether the act of abjuring and renouncing allegiance

to the United States was accomplished voluntarily. In support of this position the following excerpts from the decisions of this Court in the case of *McGrath v. Abo supra,* are pertinent.

> "The Attorney General also indicated his realization of his duty to the United States to prevent a restoration of citizenship to the *disloyal renunciants* who gave up their American citizenship voluntarily because of their sympathy with Japan and hoped for the latter's victory over the country of their birth * * *.
>
> "The record shows the certainty that many of the 4,315 plaintiffs who voluntarily renounced were *disloyal* to the United States. It discloses that many of the plaintiffs did not show any interest in setting aside their revocations until after the atomic bombing of Hiroshima and Nagasaki had made it clear that the Japanese cause was hopeless and that the material conditions in the United States had become greatly preferable to those in Japan" (P. 771-772). (Emphasis supplied).
>
> "The District Court rendered an interlocutory decree on the stipulated submission of the causes on the merits. It found on substantial evidence the coercive conditions existing at Tule Lake but correctly recognized the likelihood that some of the plaintiffs were *disloyal* Americans who renounced voluntarily." (P. 773).
> "Concerning the designants, the defendants have indicated their good faith in discharging their obligation to the individual *loyal* renunciants and their duty to prevent the restoration of citizenship to the *disloyal.*" (P. 774) (Emphasis supplied).

From the foregoing, it is evident that this Court was of the opinion that evidence of disloyalty to the United States and loyalty to Japan, as reflected by the defendant's various offers of proof, is relevant and pertinent

to the consideration of the question of whether or not such persons who renounced allegiance to the United States were, in many instances, likely to have done so voluntarily. We submit that the District Court was acting within proper limits in considering evidence of disloyal acts of the plaintiff when weighing his uncorroborated assertions as to the alleged coercion which caused him to renounce his citizenship. Particularly pertinent to the instant cast is the observation of Judge Bone in his dissenting opinion in *Takehara v. Dulles,* 9 Cir., 205 F. 2d 560, 563:

> "The obvious overriding personal interest of appellant in the outcome of the case, the inherent probability, or lack thereof of the truth of his story were clearly proper factors to be considered. The Court might well weigh as it did, the problem of whether cold objectivity characterized appellant's description of purely emotional reactions known only to himself."

In the instant case evidence as to plaintiff's loyalty to Japan clearly was available to counteract his self-serving assertions of events known only to himself and otherwise not specifically corroborated. It is here appropriate to note the proposition, so widely accepted, it needs no citation of authority, that on disputed fact questions Courts of Appeal afford great weight to the opportunity of the trial court, in reaching its findings, to observe the demeanor and the manner in which a person testified.

The appellant asserts in his brief that the trial court did not disbelieve the testimony of plaintiff or the veracity of his reasons for renouncing his citizenship but on

the contrary believed the plaintiff, yet, nevertheless held as a matter of law, that the renunciation was invalid (Brief, pp. 7-8, 12, 24). We assert, *per contra,* that the District Court held that the plaintiff did not sustain his burden of proving that his act of renunciation was involuntary, a result it patently could not have reached if it believed that this plaintiff's assertions were worthy of belief. The defendant did not and of course could not introduce *direct* evidence contradicting the assertions of this plaintiff that he renounced because he was not wanted in the United States and that his roommates, members of pro-Japanese organizations, threatened him with physical violence unless he did renounce. Accordingly it would appear that the only valid conclusion that can be drawn, in the light of the District Court's finding, is that the Court in weighing the plaintiff's assertions, in the light of the other evidence, did not accept as true the testimony of the plaintiff even though not specifically contradicted. Although the Court did not specifically indicate in its findings or opinion that it did not believe the recitation of the plaintiff as to specific acts of corecion, it seems obvious from a reading of the record as a whole, that the Court was well justified in having reservations as to the testimony of the plaintiff. For example, at the trial he testified that his reasons for renouncing were fear of bodily harm if he did not do so, and the feeling that the United States Government did not want him as a citizen. Compare this with the statements contained in his affidavit executed before a United States Consular Officer in Japan on October 11, 1950, (Defendant's Pre-trial Exhibit No. 26), wherein he

stated that the reason he renounced was that he feared he would be indefinitely or permanently interned and that there was no escape from internment except by renouncing his citizenship, and expecting to be removed to Japan involuntarily he feared that the Japanese in Japan would take reprisals against him if he did not renounce his citizenship. While it is true that the plaintiff seems to assert that his wife, who wrote the answers to the questions contained in the affidavit, somehow failed to put down all his reasons, it is equally true that nowhere is it asserted that the affidavit executed in Japan was done as a result of coercion or intimidation. It is almost impossible to believe, that if in fact the plaintiff renounced because of fear of physical violence, he would have refrained from asserting it in the aforementioned affidavit or that his wife would have failed to record it and this is particularly so when it is remembered that *the whole purpose of executing the affidavit looked to the possibility of his being documented as an American citizen.* While apparently the plaintiff cannot read English well, it is not far fetched to infer that the instructions for the preparation of the affidavit were made known to him and these instructions specifically state that if any action, including the act of renunciation, was taken as the result of fear caused by threats from individuals or groups of individuals the nature of the threats, the names of the individuals making them, if known, and the time, place and occasion for the making of the threats should be given. At the trial plaintiff named three persons (his roommates) whom he alleged threatened him with phy-

sical violence if he did not renounce his citizenship (R. 115, 116, 185). Nevertheless no mention of the roommates and their threatening actions was mentioned in the affidavit submitted with his passport application. He asserts in explanation of this that he did not remember the names at the time he made out the affidavit but that his memory was refreshed upon observing the forms exhibited to him by his counsel (presumably he is referring to the forms introduced in evidence by the defendant at pre-trial) and upon viewing the forms he remembered "those dates and the names" (R. 171). We submit that this taxes belief beyond bounds. Other aspects of plaintiff's activity and demeanor in testifying which might well justify the trial court in not attaching too much weight to his testimony are to be found in his inability to remember his own signature when it was exhibited to him (R. 141-142) and his statement that he did not know that his brother had left a relocation center or went to work (R. 134) whereas he admitted on cross-examination that at his renunciation hearing he stated that he knew his brother was working on a railroad. It would also appear that the trial court could not help but be impressed by the fact that almost without exception when testifying as to matters favorable to him his recollection and memory were unimpaired but on being cross-examined with reference to matters apparently unfavorable, on a least eight occasions, he indicated that he could not remember the matter under discussion (R. 140, 141, 142, 155, 156, 157, 170, 185).

Again, with respect to plaintiff's statement in the affidavit filed with his passport application (Defendant's

Pre-trial Exhibit No. 26) that, expecting to be removed to Japan involuntarily he feared that the Japanese in Japan would take reprisals against him if he did not renounce prior to his arrival in Japan, it should not be forgotten that he applied voluntarily for repatriation on June 11, 1944, prior to his renunciation and also on October 17, 1945, subsequent to his renunciation. In these circumstances, it is difficult to find support for the statement that he expected to be removed to Japan involuntarily.[6] Counsel for plaintiff in redirect examination directed plaintiff's attention to Defendant's Pre-trial Exhibit No. 23(b) (Application for Repatriation dated October 17, 1945) and drew from plaintiff the statement that he was not referring to Exhibit No. 23(b) when he testified that he executed it under pressure from the Hoshi-dan, but rather he was referring to the Application for Repatriation dated January 11, 1944 (Defend-

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[6]It is here pertinent to note that on December 19, 1944, prior to plaintiff's renunciation, Major General H. C. Pratt, Commanding General of the Western Defense Command, withdrew the public proclamations and orders of 1942 which had ordered the exclusion of all persons of Japanese ancestry from the West Coast area. Lifting of the exclusion orders permitted all such persons including plaintiff to return to the West Coast with the exception of named individuals who were served with individual exclusion orders. Plaintiff was not served with such an individual order and the Project newspaper, at Tule Lake, *The Newell Star, published this proclamation on the same* day (R. 18-19). While the present record does not indicate whether these events were brought to plaintiff's attention, it would seem that in the normal course of events he would have obtained such information since it is clear, that in addition to the Project newspaper, citizen evacuees at all times had access to newspapers, magazines and radios, including some short-wave sets.

ant's Pre-trial Exhibit No. 21(d); R. 175). How this impression could be gathered by the plaintiff is not understandable since the date of the document, namely October 17, 1945, was specifically drawn to his attention together with his statement as to the reasons he wished to be repatriated to Japan and, further, objection was made by counsel for the plaintiff on the grounds that it was made some eight months later than the plaintiff's renunciation of citizenship (R. 136-139). Furthermore, when shown Defendant's Pre-trial Exhibit No. 21(d) (Request for Repatriation dated June 11, 1944) he made no mention at all of any pressure being exerted on him by anyone (R. 145-146).

In citing these matters we do not think that we are magnifying them so as to give them a significance which the record will not sustain. In contradistinction to this Court's comments in the case of *Mar Gong v. Brownell, supra,* the matters which we discuss are for the most part directly related to the basic issue, namely, whether this plaintiff, with a record of pro-Japanese loyalty, involuntarily renounced his citizenship.

Plaintiff testified that the reason he returned to the United States in 1940 was that he was subject to draft in the Japanese Army if he stayed in Japan another year and that since he was an American he did not like to go in the Japanese Army (R. 119-120). Presumably he also did not desire to volunteer for the American Army in view of his negative answer to Question 27 of the Selective Service Form DSS-304A (Defendant's Pre-trial Exhibit No. 21(b)). Furthermore, in considering

his statement relative to his antipathy to becoming a draftee in the Emperor's armed services, it would not be unreasonable to draw the inference that he may have returned to he United States in 1940, in view of his knowledge that Japan was carrying on a war with China in Manchuria (R. 127-129). Finally, and presumably to explain his stay at Tule Lake where conditions existed which exposed him to coercion, he stated that at the beginning of 1945 he knew of some people who had gone back to the Pacific Coast where they could not find jobs and he also heard a rumor that some of them were being physically assaulted (R. 118, 119). As to this it should be remembered that plaintiff applied for forms upon which to renounce on December 20, 1944, prior to the actual lifting of the exclusion orders (Defendant's Pre-trial Exhibit No. 22(a)). Moreover, there is no evidence of record that he would have had to go to the Pacific Coast in any event and, while this might have been a more desirable place for him to return to, nevertheless if the choice was between subjecting himself to the pressure of renouncing his citizenship (something which he allegedly abhorred) (R. 117, 118) and the inconvenience of relocating other than to the Pacific Coast, it would appear that the choice for him was clear. Appropriate to note here is the language of *Doreau v. Marshall,* 3 Cir., 170 F. 2d 721, 724, cited in *Sovorgnan v. United States,* 338 U.S. 491:

> "The forsaking of American citizenship, even in a difficult situation, as a matter of expediency, with attempted excuse of such conduct later when crass material considerations suggest that course, is not duress."

In view of the foregoing we respectfully submit, that pursuant to the provisions of Rule 52(a) *Federal Rules of Civil Procedure,* the findings of fact of the District Court should not be set aside because they are not clearly erroneous. *United States v. Fotopulos,* 9 Cir., 180 F. 2d 631, 634; *Pacific Portland Cement Co. v. Food Machinery and Chemical Corp.,* 9 Cir., 178 F. 2d 541; *United States v. Aluminum Co. of America,* 3 Cir., 148 F. 2d 416, 433. In so stating we are not unaware of the rule that in considering documentary evidence Courts of Appeal may give the same, the weight they deem it entitled to *de novo. Smyth v. Barneson,* 9 Cir., 181 F. 2d 143, 144; *Western Union Telegraph Co. v. Bromberg,* 9 Cir., 143 F. 2d 288, 290. In view of this court's favorable comment on the defendant's various offers of documentary proof in the *Abo* case, *supra,* we urge that any *de novo* consideration should not produce disagreement with the weight given to such evidence by the court below. Indeed, had the District Court found otherwise, we would now assert, that, in the light of plaintiff's own acts, his testimony was a patent fabrication and absurd.

Particularly appropriate here is the language of this court in the *Pacific Portland Cement Co.* case, *supra,* where the Court said at Page 548 as follows:

> "* * * we are faced with the mandate of Rule 52(a) of the *Federal Rules of Civil Procedure* which bids us not to set aside findings unless they are 'clearly erroneous'. *Federal Rules of Civil Procedure,* Rule 52(a). Under the interpretation which the Supreme Court, and this and other courts of appeal, have placed upon this section, the findings of a trial judge will not be disturbed if supported by substantial evidence. Full effect will always be given to the

> opportunity which the trial judge has, *denied to us,* to observe the witnesses, judge their credibility and draw inferences from contradiction in the testimony of even the same witness."

The plaintiff is not aided in his cause by the mere fact that the defendant, apart from establishing the eloquent testimony of plaintiff's own act, was not able to produce any direct evidence to contradict his recitations as to his state of mind and specific instances of alleged coercion, known of course, only to himself. *National Labor Relations Board v. Howell Chevrolet Company, supra.* A host of cases in support of this proposition are also cited by Judge Bone in his dissent in *Takehara v. Dulles, supra,* footnote 3.

We believe that the evidence of record indicates that prior to, at the time of, and subsequent to his renunciation his loyalty was wholly to Japan and not to the United States and accordingly the trial court was fully justified in giving little or no weight to plaintiff's testimony. Paraphrasing the language of *Knauer v. United States,* 328 U.S. 654, 660:

> "We conclude with the District Court and the Circuit Court of Appeals that there is solid, convincing evidence that *Murakami* before the date of his *renunciation,* at that time, and subsequently was *loyal to Japan* * * *. The conclusion is irresistible therefore that when he *renounced* allegiance to the *United States* * * * *he did so voluntarily.*" *Cf. Angello v. Dulles,* D.C. N.Y., 110 F. Supp. 689, 692.

The appellant further asserts in his brief (p. 12), having made the assumption that there is no question of credibility or conflict of evidence in the instant case,

that he is entitled to a judgment that he is a citizen of the United States as a matter of law, in view of the holding of this Court in the case of *Acheson v. Murakami, supra.* As hereinbefore demonstrated there is a very definite question of credibility here present. Moreover, the question of duress we submit is a personal one, and the mere recitation of some of the similar, although incomplete, facts of record in the *Murakami* case and the instant case, does not present an *a fortiori* case of duress for the plaintiff.[7] Additionally, an examination of the record in the case of *Acheson v. Murakami, supra,* does not indicate that the parties applied for repatriation prior and subsequent to their renunciation of citizenship or refused to swear loyalty to the United States or voluntarily returned to Japan. In fact the record shows that the female plaintiffs, *Sumi, Shimizu* and *Mae Murakami,* were given mitigation hearings at their request subsequent to their renunciation and remained in the United States.

Appellant, in pages 20 through 26, of his brief, attempts to demonstrate error on the part of the District Court by arguing that the District Court disregarded various factors which this Court has held may cause one's acts to be involuntary and based its judgment on an irrelevant consideration. We do not believe this asser-

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[7]It would seem pertinent to here refer to *Mar Gong v. Brownell, supra,* wherein this Court stated: "Similarly we think that the Court here should not have given weight to its experiences, unfortunate as they may have been, in other cases, in arriving at its findings with respect to this appellant. Each case should be allowed to stand upon its own bottom."

tion to be correct. The District Court found that the plaintiff's testimony that he was coerced was, *in his case,* insufficient to carry his burden of proof and this in the light of the whole record. Presumably what appellant complains of is that the trial court did not view the evidence in the manner in which he would have desired the Court to view it.[8] Even assuming *arguendo* that the trial court could have viewed the facts differently or even that this Court would have done so if it were the initial trier thereof, this alone, we submit, would not justify reversal.*Nee v. Linwood Securities Co.,* 8 Cir., 174 F. 2d 434, 437; *Skelly Oil Co. v. Holloway,* 8 Cir., 171 F. 2d 670, 674; *Cf. U. S. Line Company v. Cummings,* 9 Cir., 195 F. 2d 221, 223; *Continental Casualty Co. v. Schaefer,* 9 Cir., 173 F. 2d 5, 8; Cert. den. 337 U.S. 940. See and compare *Pandolfo v. Acheson,* 2 Cir., 202 F 2d 38, 40-41.

In the instant case the Court in its findings of fact No. 23 (R. 76), squarely met the fact issue of whether or not the plaintiff's act of renunciation was involuntary. As we read *Takehara, supra,* cited by appellant as requiring reversal of the trial court, we believe that that decision can properly be considered only as a rejection of the theory that *Takehara* was required to take affirmative steps to preserve his claim to American citizen-

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[8]Certainly, in view of plaintiff's rebuttable presumption, the trial court was under no duty to specifically set forth in its findings of fact every conceivable fact of record pertaining to the general conditions at Tule Lake.

ship,[9] and as a remand for a finding on one of the important issues of the case, namely, whether the evidence established that plaintiff there, voted in the Japanese elections as a result of duress.

In urging the affirmance of the trial court's finding, that plaintiff did not sustain his burden of proving a coerced renunciation, we submit that this Court in passing on this disputed issue of fact should take the view of the evidence and all of the inferences reasonably deduc-

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[9]The appellant at Page 25 of his brief makes reference to portions of the trial court's Finding No. 22 (R. 76) and its opinion (R. 70), wherein mention is made that this plaintiff was a citizen of Japan by virtue of his birth of Japanese parents and that when he renounced citizenship in the United States he automatically accepted citizenship in Japan. From this appellant argues, albeit faintly, that the trial court in some manner erroneously held that the plaintiff by his actions "elected" Japanese citizenship and therefore lost his United States citizenship citing *Mandoli v. Acheson,* 344 U.S. 133. In order that there may be no misunderstanding, appellee's position in this cause is that plaintiff's renunciation of citizenship was voluntarily accomplished pursuant to the provisions of Title 8 USC 801(i). Nothing of record in the instant case makes appropriate the citation of *Mandoli, supra,* and although the trial court did state that when this plaintiff renounced United States citizenship he automatically accepted citizenship in Japan, we believe such statement to be unnecessary, since it is not germane to the issue as presented in this case. This is so for the reason that the Court below having found that the plaintiff did not sustain his burden of proving that his renunciation was coerced, the plaintiff was subject to deportation by the very terms of the certificate of identity issued to him entirely apart from any question as to his possession of dual citizenship by virtue of his birth, prior to the 1924 amendment to the Japanese law, see *Naito v. Acheson,* D. C. Cal. 106 F. Supp. 770, 772.

tible therefrom, which are most favorable to the prevailing party. *Maryland Casualty Co. v. Stark,* 9 Cir., 109 F. 2d 212, 215; *Skelly Oil Co. v. Holloway, supra; Maryland Casualty Co. v. Cushing,* 7 Cir., 171 F. 2d 257, 259.

II.

The Court Below Did Not Abuse Its Discretion in Refusing to Grant Plaintiff's Motion for Voluntary Dismissal Made Pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure.

The provisions of Rule 41 of the Federal Rules of Civil Procedure pertinent to the matter here under discussion are as follows:

> "*Dismissal of Actions*
>
> "(a) Voluntary Dismissal; Effect Thereof.
>
> "(1) *By Plaintiff; by Stipulation.*
>
> "Subject to the provisions of Rule 23(c) of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of the court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action * * *
>
> "(2) *By Order of Court.*
>
> "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the Court and upon such terms and conditions as the Court deems proper. * * *"

This Court judicially knows that the present plaintiff was a party plaintiff in the case of *McGrath v. Abo, supra,* at the time that it remanded that cause to the District Court for the Northern District of California. (See footnote 3, page 2, *supra*). The complaint in the present case was filed in the District of Oregon on August 10, 1951 (R. 2-4), and the answer thereto filed by the Defendant October 19, 1951 (R 5-6). A certificate of identity was issued to this plaintiff pursuant to the provisions of Title 8 USC 903 on December 10, 1951 and he arrived in the United States in January of 1952. The pre-trial order was entered on January 19, 1952 (R. 55) and trial was begun on the same date, namely, January 19, 1952 (R. 93). The proceedings therein were terminated on that day and were not resumed until some ten months later, on November 20, 1952 (R. 189). On November 19, 1952, the plaintiff filed an application for voluntary dismissal pursuant to Rule 41(a)(2), *Federal Rules of Civil Procedure* which motion was supported by affidavits of plaintiff and his counsel (R. 62-67). The Court having heard the statements of counsel (R. 189-195) (counsel for defendant objected to the granting of the motion) entered its order denying said motion on November 20, 1952, whereupon proceedings in the trial were resumed. The substance of the affidavit filed by plaintiff's counsel (R. 62) is to the effect that when the plaintiff executed the supplemental affidavit submitted with his passport application in Japan, he did not have the assistance of counsel and that, as a lay-person, he was unable to make a proper showing, without the assistance of counsel that his case should be administratively considered to come

within the purview of the *Murakami* and *Abo* decisions, *supra*. The affidavit of the plaintiff (R. 66) was to the effect that on November 18, 1952, he went to an office of the Department of State in Seattle, Washington, to file an application for a passport but when told that he would be required to fill out a supplemental affidavit it was his feeling that he should consult an attorney before so doing since he had been unsuccessful in convincing appropriate governmental officials that his renunciation was involuntary when he filed a similar affidavit in Japan.[10] On the basis of these assertions the appellant asserts that the trial court acted arbitrarily and abused its discretion in denying the motion. He also appears to assert in his brief that the motion should have been granted because the defendant would not have suffered any prejudice thereby (p. 28) and that therefore the plaintiff was entitled to a dismissal as a matter of right, the same being restricted only upon order of the court and upon such terms and conditions as the trial court

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[10]Appellant asserts at Page 27 of his brief that had the trial court permitted the dismissal, that might well have obviated the necessity of a trial and in support of this cites the case of one Tomi Katsuda, who having failed once to obtain an administrative determination that her case was within the provisions of *Acheson v. Murakami, supra,* upon subsequent submission of an affidavit, aided by counsel, she obtained a favorable administrative determination. This assertion presupposes that the mere retention of counsel will *ipso facto* result, in the case of every renunciant, in a favorable administrative decision. In addition to denying the validity of this supposition we think it here appropriate to again refer to this Court's comment in *Mar Gong v. Brownell, supra,* wherein it is stated that each case should be allowed to stand upon its own bottom.

deemed proper. In stating this proposition he appears to rely for the most part on two District Court cases and a decision of the Court of Appeals for the Seventh Circuit: *Maryland Casualty Co. v. Quality Foods,* 8 FRD 359, 361, 362 (D.C. E.D., Tenn., 1948); *Welter v. E. I. du-Pont De Nemours & Co.,* 1 FRD 551 (D.C. Minn., 1941); *Bolten v. General Motors Corporation,* 180 F. 2d 379.

We believe that the short answer to this contention is that the authorities cited by the appellant constitute the minority view that the great weight of authority is that the granting or denial of a voluntary dismissal without prejudice under Rule 41(a)(2) is a matter of judicial discretion the exercise of which will not be disturbed on appeal in the absence of clear abuse. *Moore, et al. v. C. R. Anthony Co., supra; United States v. Pacific Fruit and Produce Company, supra; Ockert v. Union Barge Line Corp., supra; Rollison v. Washington National Insurance Co.,* 4 Cir., 176 F. 2d 364. In the *Ockert* and *Moore* cases, *supra,* both the Third and Tenth Circuits, noted the *Bolten* decision, *supra,* but in both cases indicated, that the majority and better reasoned view was to the effect that the power of a District Court to order a dismissal of a case without prejudice is a matter of judicial discretion which will not be disturbed on appeal. While it is true that the Eighth Circuit in the case of *Home Owners Loan Corporation v. Huffman,* 8 Cir., 134 F. 2d 314, cited by appellant in his brief, held that under the undisputed facts and circumstances of that case the trial court abused its discretion in permitting a dismissal without prejudice, nevertheless it took

pains to point out that upon a plaintiff's motion to dismiss without prejudice it is not the equities of the plaintiff that are the subject for consideration under the rule but rather the protection of the rights of the defendant. In amplification of this principle the Court in the *Huffman* case stated as follows at Page 318:

> "The defendant argues that some of the reasons for overruling the motion stated by the trial court in its opinion and comment at the hearing are invalid and do not support the order. This Court can not inquire into and examine the mental operations of the trial court in its exercise of a discretionary power. On such an appeal as this, we are limited to a consideration of whether the order itself constitutes an abuse of discretion in that it infringes the legal and equitable rights of the defendants as shown by the circumstances or facts conceded or undisputed."

Applying the principles of the aforementioned cases we do not think that it can fairly be said that the trial court in denying the plaintiff's motion to dismiss clearly abused its discretionary power. Certainly the fact that present counsel for the appellant did not become acquainted, until subsequent to January 19, 1952, with a part of the Government's brief filed on appeal in *McGrath v. Abo, supra,* (decided January 17, 1951, while plaintiff was still a party to that action), referring to potential administrative relief available to renunciants upon the filing of affidavits with passport applications, is not indicative of an abuse of discretion by the trial court. *Cf. United States v. Pacific Fruit and Produce Company, supra.* Furthermore, we are at a loss to understand what appellant could accomplish in the way of clarifying the circumstances of his renunciation by the affidavit procedure that could not be more readily accomplished,

after consultation with counsel, by direct testimony at this trial. Certainly there is nothing of record which indicates that counsel for appellant did not have ample time to confer with the appellant prior to the trial of this cause.

It is asserted in the affidavit of plaintiff's counsel, that unless a person, even a lawyer, were familiar with the decision of this Court in *Acheson v. Murakami,* he might very well fill out the affidavit without touching upon matters "the Attorney General or the State Department were looking for." We submit that there are no questions in the affidavit which are in and of themselves so difficult that they can not be adequately answered by the mere recitation of the truth of the matter. That many persons in Japan were able to execute affidavits as to whom the Department of State advised the appropriate Consular Officer that their cases might be considered as coming within the purview of the *Murakami* decision is attested to by a copy of the letter from the Department of State dated January 22, 1954 (set forth in Appendix "C", *infra*), in which they advise that the records of that Department, taken from available renunciant files, disclose that various American Consular Posts in Japan were notified that the passport applications of at least 184 renunciants resident in Japan, who filed affidavits, were approved.[11]

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[11]The records of the Department of Justice indicate that out of a total of 768 affidavit submissions, both foreign and domestic, the Department of State had been advised by the Justice Department as of January 31, 1954, that the cases of 252 affiant renunciants could be considered as coming within the purview of the *Murakami* decision.

As to the affidavit filed by the plaintiff, he seems to assert that the trial court abused its discretion because in effect he was deprived of having two strings to his bow. This is evidenced by his statement that, subsequent to his submission of a supplementary affidavit in Japan, found to be unsatisfactory, he should have been given the opportunity, upon his arrival in this country on a certificate of identity for the express purpose of testifying at his trial, to submit an additional affidavit after consultation with his counsel. Such a contention is not encompassed within the framework of the administrative procedure announced by the Department of Justice and the Department of State and concurrence with such an assertion would be tantamount to encouraging acts looking to the aborting of the very action upon which the certificate of identity for entering the country was issued. We respectfully submit that the comment of the District Court is sound when, in hearing this motion, it stated that in its opinion, it is prejudicial to the Government of the United States to have a person in the United States that may not be entitled to be here. The provisions of former title 8 USC 903 clearly indicate that the reason for permitting a person, such as the plaintiff, to come into the United States is to prosecute to a final conclusion a *pending* court action. To permit such person to dismiss their cause without prejudice in order to substitute an administrative proceeding for judicial adjudication would afford an easy means of circumventing the provisions of the statute. Additionally, it is to be noted that in repealing Section 903 of Title 8 USC, the Congress has provided, in the case of persons living

abroad who claim a right or privilege of a national of the United States has been denied them by a department or agency of the United States, that there may be issued to them a certificate of identity and while in possession thereof they may apply for admission to the United States at any port of entry, but that a final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review only in habeas corpus proceedings. *Title 8 USCA Sec. 1503(b) & (c).* This clearly indicates the Congressional policy to be that pending the determination of the question of claimed nationality by a person resident abroad, the claimant should not be in the position of litigating the question as an ordinary civil law suit but rather that the question be speedily determined in habeas corpus proceedings attendant with custody of the claimant. Accordingly we submit that there has been no showing of an abuse of discretion by the District Court in denying the plaintiff's motion for voluntary dismissal.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the District Court is correct and accordingly should be affirmed.

WARREN E. BURGER,
Assistant Attorney General;

C. E. LUCKEY,
United States Attorney;

VICTOR E. HARR,
Assistant United States Attorney;

ENOCH E. ELLISON,
Attorne, Department of Justice;

PAUL J. GRUMBLY,
Attorney, Department of Justice.

APPENDIX A

GENERAL OFFER OF PROOF

I

With respect to the foregoing designated plaintiffs, the defendants will introduce additional documentary evidence showing that such persons received their education and formal schooling in Japan, were leaders of pro-Japanese organizations at Tule Lake, and subsequent to their renunciations of citizenship at Tule Lake, voluntarily returned to Japan. (94)

II

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence showing that such persons were leaders of pro-Japanese organizations at Tule Lake, and subsequent to their renunciations of citizenship, voluntarily returned to Japan. (76)

III

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence showing that such persons received their education and formal schooling in Japan, were members of pro-Japanese organizations at Tule Lake, and subsequent to their renunciations of citizenship at Tule Lake, voluntarily returned to Japan. (331)

IV

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence which will show that such persons were members of pro-

Japanese organizations at Tule Lake, and subsequent to their renunciations of citizenship, voluntarily returned to Japan. (382)

V

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence showing that such persons received their education and formal schooling in Japan and subsequent to their renunciations at Tule Lake. voluntarily returned to Japan. (281)

VI

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence which will show that such persons subsequent to their renunciations at Tule Lake, voluntarily returned to Japan. (284)

VII

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence showing that such persons received their education and formal schooling in Japan, were leaders of pro-Japanese organizations at Tule Lake, applied for expatriation prior to their renunciations of citizenship, and are presently under Alien Enemy Removal Orders of the Attorney General. (6)

VIII

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence which will show that such persons received their education and formal schooling in Japan, applied for expatriation at Tule Lake prior to their renunciations of

citizenship, and are under Alien Enemy Removal Orders of the Attorney General. (217)

IX

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence which will show that such persons were leaders of pro-Japanese organizations at Tule Lake, applied for expatriation prior to their renunciations of citizenship, and are under Alien Enemy Removal Orders of the Attorney General. (7)

X

With respect to the foregoing plaintiff, the defendants will introduce documentary evidence which will show that such person received his education and formal schooling in Japan, was a leader of a pro-Japanese organization at Tule Lake, and is presently under Alien Enemy Removal Order of the Attorney General. (1)

XI

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons are under Alien Enemy Removal Orders of the Attorney General and have otherwise demonstrated that their renunciation of citizenship was voluntary. (69)

XII

With respect to the foregoing plaintiffs, the defendants will introduct documentary evidence which will show that such persons received their schooling and formal education in Japan, were leaders of a pro-Japanese organization at Tule Lake and applied for

expatriation prior to their renunciations of citizenship, but are not under Removal Orders of the Attorney General. (21)

XIII

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons received their schooling and formal education in Japan, and applied for expatriation prior to their renunciations of citizenship at Tule Lake, but are not under Removal Orders of the Attorney General. (1066)

XIV

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons were leaders of a pro-Japanese organization at Tule Lake and applied for expatriation prior to their renunciations of citizenship, but are not under Removal Orders of the Attorney General. (13)

XV

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence that such persons applied for expatriation prior to their renunciations of citizenship at Tule Lake, but are not under Removal Orders of the Attorney General. (1076)

XVI

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons received their schooling and formal education in Japan and applied for expatriation subsequent to their renunciation of citizenship at Tule

Lake, but are not under Removal Orders of the Attorney General. (7)

XVII

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons were leaders of a pro-Japanese organization at Tule Lake and applied for expatriation subsequent to their renunciation of citizenship at Tule Lake, but are not under Removal Orders of the Attorney General. (8)

XVIII

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons applied for expatriation subsubsequent to their renunciation of citizenship at Tule Lake. (11)

XIX

With respect to the foregoing plaintiffs, the defendants will show that such persons, although they did not receive their education in Japan, were not leaders of a pro-Japanese organization at Tule Lake, did not apply for expatriation prior or subsequent to their renunciation of citizenship and are not under Removal Orders of the Attorney General, nevertheless, otherwise demonstrated that their renunciation of citizenship was voluntary. (278)

XX

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons did not renounce their citizenship at Tule Lake Segregation Center, and were not

therefore subjected to the factors which this Court held, in its interlocutory decree, to be of such a nature that they cast the taint of incompetency upon the acts of renunciation of citizenship. (83)

* * *

Defendant's Return to Court's Order to Show Cause Why Previously Filed Designation of Plaintiff Should Not Be Stricken.

* * *

"(3) With respect to those persons named in Exhibit XI through XIX of the designation filed as aforesaid, the defendants in response to the said order to show cause now offer to prove in addition that all of the designated plaintiffs in the said Exhibits XI through XIX, inclusive, with the exception of the following named persons, were at the Tule Lake Segregation Center as a result of answering * * Question 28 in the negative or as the result of refusing to answer the same."

* * *

APPENDIX B

Finding of Fact No.	Supported By
1. (R. 71)	Pre-trial Order No. 1. (R. 7)
2. (R. 71-72)	Pre-trial Order No. 2. (R. 7)
3. (R. 72)	Pre-trial Order No. 3. (R. 7)
4. (R. 72)	Pre-trial Order No. 4. (R. 7-8)
5. (R. 72)	Pre-trial Order No. 5. (R. 8)
6. (R. 72-73)	Pre-trial Order No. 6. (R. 8)
7. (R. 73)	Pre-trial Order No. 7. (R. 8)
8. (R. 73)	Pre-trial Order No. 8. (R. 8-9)
9. (R. 73)	Matter of Law
10. (R. 73-74)	Pre-trial Order No. 33. (R. 18)
11. (R. 74)	Pre-trial Order No. 34. (R. 19)
12. (R. 74)	Pre-trial Order No. 30. (R. 17)
13. (R. 74-75)	Pre-trial Order No. 38. (R. 20)
14. (R. 75)	Admitted in plaintiff's contention 43 (R. 33, 41)
15. (R. 75)	Admitted in plaintiff's contention 44 (R. 33, 41)
16. (R. 75)	Hearing admitted in plaintiff's contention 45 (R. 33, 34, 41)
17. (R. 75)	Signing admitted in plaintiff's contention 46 (R. 34, 41, 42)
18. (R. 75)	Admitted in contention of plaintiff 47 (R. 34, 42)
19. (R. 75)	Admitted in plaintiff's contention 48 (R. 34) and defendant's contention 46 (R. 42)
20. (R. 75-76)	Pre-trial Order No. 48. (R. 22)
21. (R. 76)	Pre-trial Order No. 49. (R. 22)
22. (R. 76)	Defendant's pre-trial exhibit 21(b) (DSS Form 304A)
23. (R. 76)	Ultimate finding in issue.
24. (R. 77)	Complaint
25. (R. 77)	Provided by 8 USC 903. (Conclusion of Law)

APPENDIX C

DEPARTMENT OF STATE

Washington

In reply refer to
F130-Murakami, Yoshio January 22, 1954

Mr. Warren E. Burger
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Attention: Mr. Ellison

My dear Mr. Burger:

Reference is made to your letter of January 13, 1954 regarding the case of Yoshio Murakami v. Dulles, File 146-54-3973, 146-54-5637.

You request information as to the number of affiant renunciants resident in Japan as to whom this Department advised the appropriate Consular Officer that their cases might be considered as coming within the purview of the Murakami decision, and who should, therefore, if they had not otherwise expatriated themselves, be documented as American citizens. Presumably, such persons in making out their affidavits in Japan were not assisted by counsel familiar with the *Murakami* decision or with the Government's brief filed in the *Abo* case, the contents of which brief counsel for plaintiff asserts led him to the belief that legal assistance was required in executing the aforementioned affidavit.

The records of this Department taken from available renunciant files disclose that this office has notified various American Consular Posts in Japan that the passport applications of 184 renunciants resident in Japan were approved, based upon the fact that the cases were considered as coming within the purview of the Murakami decision. This figure is the minimum figure, based upon records which are currently available. It is believed that similar decisions were made in 15 or 20 additional cases the records of which are not presently available.

Sincerely yours,

/s/ R. B. Shipley
R. B. Shipley
Director, Passport Office

Enclosure:
Copy of this letter.